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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

STRAWBERRY WATER USERS ASSOCIATION, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
A. Nature of the Case	3
B. The Facts	3
C. Proceedings Below	9
REASONS FOR GRANTING THE WRIT	11
I. THE COURT SHOULD REMEDY THE INJUSTICE INFLICTED ON THE WATER USERS	11
II. THE COURT OF CLAIMS IGNORED THE FUNDAMENTAL RULE ESTABLISHED BY THIS COURT THAT GREAT WEIGHT BE GIVEN LONGSTANDING REASONABLE ADMINISTRATIVE INTERPRETATIONS	13
III. THE LONGSTANDING ADMINISTRATIVE INTERPRETATION HERE INVOLVED WAS REASONABLE, AND IN FACT WAS CORRECT	15
IV. THE CASE PRESENTS ALSO AN IMPORTANT QUESTION UNDER THE GENERAL RECLAMATION LAWS	18
CONCLUSION	19

INDEX—Continued

	Page
APPENDICES:	
A. Opinion of the Court of Claims	1a
B. Section 6 of the Reclamation Act of June 17, 1902, 32 Stat. 388, 389, 43 U.S.C. § 498	35a
C. Act of April 4, 1910, 36 Stat. 269, 285	36a
D. Subsections G and I of Section 4 of the Fact Finder's Act of December 5, 1924, 43 Stat. 701, 702-703, 43 U.S.C. §§ 500-501	37a
E. Letter, dated December 31, 1915, from Senator George Sutherland	38a
F. Contract, dated October 9, 1940, between the United States and Strawberry Water Users Association	41a
G. Memorandum, dated December 12, 1950, from Solicitor, Department of the Interior	67a

TABLE OF AUTHORITIES

CASES:	Page
California v. *United States*, 438 U.S. 645 (1978)	4
Hastings & Dakota R.R. Co. v. *Whitney*, 132 U.S. 357 (1889)	14
Ickes v. *Fox*, 300 U.S. 82 (1937)	19
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275 (1958)	19
Jarecki v. *G. D. Searle & Co.*, 367 U.S. 303 (1961)	16
Kern River Co. v. *United States*, 257 U.S. 147 (1921)	14
Kindred v. *Union Pacific R.R. Co.*, 225 U.S. 582 (1912)	14
McLaren v. *Fleischer*, 256 U.S. 477 (1921)	13
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974)	13, 14
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 (1933)	14
Power Reactor Co. v. *Electricians*, 367 U.S. 396 (1961)	13
Udall v. *Tallman*, 380 U.S. 1 (1965)	13, 15
United States v. *Burlington & Mo. River R.R. Co.*, 98 U.S. 334 (1878)	14
United States v. *Campos-Serrano*, 404 U.S. 293 (1971)	16
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950)	14
Zenith Radio Corp. v. *United States*, 437 U.S. 443 (1978)	13
CONSTITUTION AND STATUTES:	
U.S. Const., 5th Amend.	3, 14
Act of April 4, 1910, 36 Stat. 269, 285 (Appendix C)	*passim*
Fact Finder's Act of December 5, 1924, Sec. 4, Subsecs. G and I, 43 Stat. 701, 702-703, 43 U.S.C. §§ 500-501 (Appendix D)	3, 6, 7, 17, 18
Reclamation Act of June 17, 1902, 32 Stat. 388, *as amended*, 43 U.S.C. §§ 371 *et seq.*	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Reclamation Project Act of August 4, 1939, 53 Stat. 1187	18, 19
28 U.S.C. § 1255(1)	2
28 U.S.C. § 1346(a)(2)	12
28 U.S.C. § 1491	3
43 U.S.C. §§ 620 *et seq.*	9
MISCELLANEOUS:	
U.S. Dept. of the Interior, *Federal Reclamation Projects—1977—Finances & Physical Features —Statistical Appendix II*	18

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Petitioners, the Strawberry Water Users Association, *et al.*,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims issued December 12, 1979.

OPINION BELOW

The opinion of the Court of Claims is reported at 611 F.2d 838 and appears as Appendix A hereto.

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[1] Petitioner Association is the water users association formed for the Strawberry Valley Reclamation Project in Utah. The other petitioners are 99 individual project water users. (*See* pp. 5-6 n. 3, *infra.*)

JURISDICTION

The judgment of the Court of Claims was entered December 12, 1979. This Court has jurisdiction under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

In 1910, by special Act of Congress, 56,869.51 acres of land were added to the Strawberry Valley Reclamation Project. Under that Act, (i) the cost of the land was added to the project construction costs to be repaid by the water users, (ii) all receipts from the use of the land were to be credited to the water users, and (iii) "title management and control" of the land were to pass to the water users when they took over the management and operation of the irrigation works under the Reclamation Act of 1902. In 1974, the water users finished paying the United States for the project, including the land. Now the United States is taking part of the land to add to another reclamation project.

The question presented is whether the Court of Claims erred when it held—contrary to the reasonable administrative interpretation consistently followed by the Department of the Interior for almost 50 years and relied upon by the water users throughout this period—that

(a) the 1910 Act did not allow any compensable title to pass to the water users without yet another act of Congress,

(b) whatever special interest in the lands the water users may once have gained through the 1910 Act, they unwittingly relinguished that interest to the United States in a 1940 contract, and

(c) while the water users, under the general Reclamation Laws and the project repayment contract, possibly

may continue to receive revenues from the part of the land not being taken, they have no compensable property interest of any type, legal or equitable, in the land being taken.

STATUTES INVOLVED

Section 6 of the Reclamation Act of June 17, 1902, 32 Stat. 388, 389, 43 U.S.C. § 498 (Appendix B).

Act of April 4, 1910, 36 Stat. 269, 285 (Appendix C).

Subsections G and I of Section 4 of the Fact Finder's Act of December 5, 1924, 43 Stat. 701, 702-703, 43 U.S.C. §§ 500-501 (Appendix D).

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners seek just compensation under the fifth amendment to the United States Constitution for the value of lands, part of the Strawberry Valley Reclamation Project in Utah (the "Project"), which the United States is taking from the Project in order to add to the new Central Utah Project. Since the United States denied that the water users held any compensable interest in the lands being taken, petitioners filed this action under the Tucker Act in the Court of Claims, with jurisdiction based on 28 U.S.C. § 1491.

B. The Facts

The Strawberry Valley Reclamation Project consists of a dam, reservoir and related irrigation and power production and distribution facilities, and some 56,869.51 acres of watershed land (the "Project Lands") which are here at issue. The reservoir covers about 8,240 acres of the Project Lands, the remaining lands being used for grazing and recreation. (App. A at 4a.) The Project,

one of the first reclamation projects in the nation, irrigates some 1,350 farms totalling about 44,571 acres.

The Project was authorized by the Secretary of the Interior in 1905 under the Reclamation Act of June 17, 1902, 32 Stat. 388 (the "1902 Act"), and was substantially completed in 1915. (App. A at 6a.) The Project Lands, once part of a reservation for the Uintah Indians, were added to the Project by the Act of April 4, 1910, 36 Stat. 269, 285 (App. C at 36a) (the "1910 Act"). That Act provided that the Indians be paid $1.25 per acre for the lands, the amount to be added to the Project construction cost to be repaid by the water users,

> "all receipts from said lands, as rentals or otherwise, being credited to the said [water users]. All right, title, and interest of the Indians in said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act [of 1902]." (*Id.*)

Under section 6 of the 1902 Act, the management and operation of the "irrigation works" were to pass to the water users when the required payments had been made "for the major portion of the lands irrigated." [2]

The 1910 Act was sponsored and authored by Senator (later, Justice) George Sutherland, of Utah, one of the principal participants in the formulation of the 1902 Act. *See California* v. *United States*, 438 U.S. 645, 657-58 n.12 (1978). In a 1915 letter to the Strawberry water users, Senator Sutherland explained the intent of the 1910 Act:

[2] 43 U.S.C. § 498 (App. B at 35a). In contrast, "title to and the management and operation of the reservoirs and the works necessary for their protection and operation" were to remain in the government "until otherwise provided by Congress." (*Id.*)

> "The fear which you express that the lands will be . . . in any manner taken from the water users, is groundless . . . . [T]he [1910] law gives you a vested right in these lands. I drew it myself with great care with the intention to accomplish this result." (App. E at 39a.)

Then, after quoting from the 1910 Act, the letter continues:

> "So you see the lands are bought and paid for and the Indian title is extinguished. The owners of the water rights reimburse the reclamation fund for these lands the same as they do for the irrigation project, and when the final payment is made by the owners, the title, management and control of these lands passes to the water owners at the same time that the management of the irrigation works passes to them. . . . [M]y opinion is that even Congress itself could not deprive you of the rights conferred because those rights have become vested by payment." (App. E at 40a. *See also* App. A at 19a-20a.)

Most of the water users obtained rights in the Project between 1916 and 1920, by entering into contracts with the United States under the 1902 Act, agreeing to pay the United States their share of the Project's operation and maintenance charges and, over a number of years, to repay all Project construction costs. At first the Project was operated by the United States. (App. A at 6a.)

Petitioner Association, a Utah corporation, was formed in 1922,[3] and under a 1926 contract with the United

[3] The Association's stock was issued to the water users in proportion to the water rights they held in the Project, and each stockholder in turn deeded his interest in the Project to the Association. The Association presently has about 1,200 water user stockholders representing a 94.8 share of the Project water. Approximately 207 individuals own the remaining 5.2 percent for which no stock has been issued. Ninety-nine of these, representing 3 percent of the

States it took over the care, operation and maintenance of most of the Project.[4] At that time the water users believed, based in part on views expressed by officials of the Bureau of Reclamation, that they held valuable, vested property rights in the Project Lands and ultimately would receive title.[5] In keeping with the 1902 and 1910 Acts, the 1926 contract provided as to the Project Lands that

> "title, management and control of said purchased land is not to pass to the Association under said [1910] Act unless and until at least 51 percent of the project construction cost is repaid to the United States. . . ." (App. A at 26a.)

Under the contract, profits from the lands were to be collected by the Association and credited under Subsection I of Section 4 of the Fact Finder's Act of 1924, 43 U.S.C. § 501 (App. D at 37a), which prohibited distributions to individual water users until all construction costs were repaid. (*See* App. A at 26a.)

In 1928 the contract was amended to allow the Association to take over also the operation and maintenance of the Project Lands.[6]

Project, joined as individual plaintiffs below and are petitioners here. (*See* App. A at 4a.)

For ease of reference, the Association and the water users are herein sometimes collectivly referred to simply as the "water users."

[4] The Fact Finder's Act of 1924 had changed the conditions for project takeover, permitting it to occur when two-thirds of the irrigable area of a project was covered by water rights contracts. 43 U.S.C. § 500 (App. D at 37a).

[5] Plaintiffs' Exhibits ("Pl. Exs.") 14, 15, 18, 28-31.

[6] *See* App. A at 27a. Under the amendment, the Association was to use the land "for the benefit of the [water users]" and was authorized to "collect and use the receipts from any [existing or future] contracts," with the profits to be handled as under the 1926 contract. (*Id.* at 27a n.25.)

Then, in 1940, shortly before 51 percent of the Project construction costs were repaid, the 1926 contract again was amended, *inter alia* to extend the time for repaying construction costs. Section 20 of the amendment provided:

> "Notwithstanding the provisions of the Act of April 4, 1910 (36 Stat., 285), it is agreed that title to the [Project] lands . . . shall be retained by the United States until otherwise provided by Congress. The management and control of said lands shall remain with the Association. . . ." [7]

After 1940, the water users continued to pay the construction costs, and by 1974 they had repaid the full $3,499,734.22 charged to the Project, including the $71,085.65 paid under the 1910 Act for the Project Lands. (App. A at 34a.) Throughout the history of the Project, even after 1974, the water users have received the benefit of all profits earned from various revenue producing activities conducted on the Project Lands. (*See* App. A at 17a.)

Repeatedly over the years the Department of the Interior has had occasion to give its views of the rights of the water users in the Project Lands, either in letters, contracts, formal opinions by the Department's Solicitor, or through its actions. While the Department expressed itself using varying terms, there is no dispute that throughout the history of the Project—both before and after 1940—the Department consistently interpreted the applicable laws and contracts as granting the water users a valuable vested property interest in the Project Lands. The opinion below recited only some of these instances, while acknowledging "[t]he record of consistent interpretation over successive years." (App. A at 31a.)

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[7] App. F at 56a. Use of profits from the Project Lands again was to be governed by the Fact Finder's Act. (*Id.* at 57a; App. D at 37a.)

Thus, the court noted that in several early disputes with outside interests which sought to challenge the water users' right to the lands the Bureau of Reclamation always supported the water users. (App. A at 19a.) It further found that Senator Sutherland's 1915 view that the 1910 Act gave the water users a vested right in the land "appears with regularity in subsequent reclamation program administrative records." (*Id.* at 20a.) More specifically, in 1921 the Department's Solicitor noted that the government held title only "as trustee for the benefit of the water users . . . . whose lands must bear the burden of the cost of the project." (*Id.* at 21a).[8] In 1930, the Commissioner of Reclamation advised the water users' Congressman that the water users, having repaid 33 percent of the construction costs, had under the 1910 Act "quasi-equitable title" to an interest in the lands, with the United States holding "67 percent of the equitable ownership." (*Id.* at 25a.) Most noteworthy, however, is a 1950 Solicitor's Opinion which, after a thorough analysis, concluded that the 1910 Act transferred "the equitable title to the landowners pending the transfer of legal title," and that "although the legal title . . . is still in the United States, the beneficial interest in these lands is vested in the [water users]."[9] This stood as the Department's official interpretation for almost the next twenty years.

The government at times also took specific actions based on its view of the water users' rights. In 1964, for example, it sought from the Association a right-of-way

[8] Two years later the Director of the U.S. Reclamation Service advised the Association that the water users "have an equity in these lands which has become vested by the legislation creating a reserve and the payments that have been made thereunder." (Pl. Ex. 18 at 1.)

[9] App. G at 74a-77a; *see also* App. A at 32a. A 1967 opinion similarly concluded that the Association "owns the beneficial interest" in the lands. (*Id.* at 33a.)

across the Project Lands (Pl. Ex. 88 at 1), and in 1966 it obtained from the Association a permit to use some lands for construction, noting in the permit its intent to acquire necessary lands either by negotiation or eminent domain. (Pl. Ex. 94.)

In 1956 Congress authorized construction of the Central Utah Project (*see* 43 U.S.C. §§ 620 *et seq.*), which included the enlargement of the Strawberry Reservoir by flooding about 13,500 additional acres of Project Lands. In connection therewith, the Department's Solicitor's Office, in a 1968 opinion on the question of who owned the lands, completely reversed the Department's long held views and determined that, through the 1940 contract, the water users had given up virtually all rights to the land and that the land was owned by the United States. Therefore, once the water users finished paying for the Project—including the land—the land could be taken without compensation. (App. A at 33a-34a.)

C. Proceedings Below

Petitioner Association filed this action on November 29, 1973.[10] The parties agreed that the proceedings initially be limited to the question of the water users' ownership interest in the lands being taken. After extensive pretrial proceedings,[11] the government moved for summary judgment on the issue of liability, petitioners cross-moved, and on January 11, 1979, the Trial Judge issued his

[10] On December 9, 1974, the petition was amended to add as plaintiffs 99 individual water users. (*See* App. A at 3a n.1.)

[11] These included filing a joint stipulation with the court in 1976 agreeing that, subject to certain limitations, the water users held "the beneficial or equitable interest" in the land, while the United States held "legal title." The case then appeared ready to proceed to valuation. However, on motion of the government, the stipulation subsequently was stricken.

recommend[illegible]ecision.[12] Both sides then asked the Court of Claims [illegible]iew this recommendation.

On December 12, 1979, the court issued its opinion, granting the government's motion for summary judgment, denying petitioners' cross-motion, and dismissing the petition. (App. A at 3a.) It adopted the Trial Judge's recommended opinion (*id.*), but with certain modifications and deletions. Although the parties had extensively briefed and argued over whether, if the water users held no patent to the land, they at least had beneficial title or a perpetual right to income for the taking of which compensation was due, the court inexplicably found that "the right of the plaintiffs to future revenues . . . . is not an issue in this case," and declined to rule thereon. (*Id.* at 2a-3a.) What it held was that " the enlargement of the reservoir . . . . did not constitute a taking of plaintiffs' property which would entitle them to compensation." (*Id.* at 2a.) Its only explanation was that

> "[r]egardless of what interests the plaintiffs may have had in the project lands prior to 1928, we hold that as a result of the contracts entered into with the United States in 1928 and particularly in 1940, plaintiffs conveyed or relinquished to the United States and were divested of any property interest, legal or equitable, that entitles them to recover for a taking of the project lands in issue in this case. . . ." (*Id.* at 3a.)

The ruling that the 1910 Act, peculiar to this Project, either was never effective to pass title or was nullified by the 1940 contract, and that therefore the water users have no compensable interest in the lands, means that the water users also acquired no compensable property inter-

[12] The court had referred the cross-motions to the Trial Judge for his initial determination and recommendation under Court of Claims Rule 54(b).

est in any part of the Project (except the water)[13] under the other laws which still govern the Project, being Reclamation Laws of general application to many projects, even after all project costs were fully repaid.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD REMEDY THE INJUSTICE INFLICTED IN THE WATER USERS

While this case presents important legal issues of broad impact, this Court should grant this petition first and foremost so as to remedy the rank injustice perpetrated on some 1,500 water users—mostly small farmers—at the Strawberry Project. The decision of the court below condones—indeed contributes toward—a blatant breach of faith by the United States government.

The water users signed up for Project water and assumed repayment obligations believing, based on the 1910 Act and the assurances of the Act's author, that, on repaying the Project construction costs and the costs of the land, the land would be theirs. For the next fifty years, relying on the consistent interpretations of the Bureau of Reclamation and Department of the Interior, they continued through good times and bad to pay for the Project and for the land. They managed the Project, and received all income from the land. In 1940 they agreed that legal title to the land could remain with the United States, but they still held and received all benefits from the land, and continued to be assured by the government that they had a valuable vested property right—

[13] Implicit is the conclusion that, whatever right to revenue the water users may have, the right is not a compensable property interest, but rather is like a mere license, revocable at the will of the sovereign. The water users perhaps may continue to receive revenues from the land not being taken, but the government may deprive them of these revenues at any time.

described usually as beneficial title—in the lands. And so they continued to pay for it, and the entire debt has now been repaid.

Then, in 1968, when the government needed the land for another project and realized it would have to pay the water users for taking the land, the water users suddenly were informed that all the earlier interpretations, including formal solicitor's opinions, had been wrong, and that even the 1910 Act's author had misinterpreted the Act. They were told that as soon as the water users finished paying for the Project, the government would own the land. They could still receive income therefrom, if the government let them do so, but it could take the remaining land for other purposes at will, without paying compensation. The injustice in this, which the Court of Claims now has sanctioned,[14] should be self-evident. The water users' only available remedy lies with this Court,[15] and review therefore is essential.

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[14] It is difficult to know why the Court of Claims reached the conclusion it did. Its result is quite different from the Trial Judge's recommendation, but its opinion describes the result only briefly (App. A at 1a-3a), and then adopts the Trial Judge's recommended opinion with key paragraphs deleted. The court's reasoning thus is hardly explained, and one can only speculate as to why it ruled as it did.

[15] The action initially could be brought only in the Court of Claims, since the federal district courts' jurisdiction over inverse condemnation claims is limited to claims not exceeding $10,000. 28 U.S.C. § 1346(a)(2). Only the Court of Claims has ruled on this dispute to date. A dispute as important as this one should have the benefit of at least one appellate review.

II. THE COURT OF CLAIMS IGNORED THE FUNDAMENTAL RULE ESTABLISHED BY THIS COURT THAT GREAT WEIGHT BE GIVEN LONGSTANDING REASONABLE ADMINISTRATIVE INTERPRETATIONS

In *Udall* v. *Tallman*, 380 U.S. 1 (1965), this Court explained the deference that courts owe to the reasonable interpretations of an agency charged with administering a statute:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . 'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."' *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408." (308 U.S. at 16.)

Then, quoting from *McLaren* v. *Fleischer*, 256 U.S. 477, 480-81 (1921), the Court said:

> "In the practical administration of the act the officers of the land department have adopted and given effect to the latter view. They adopted it before the present controversy arose or was thought of. . . . If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons." [16]

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[16] 380 U.S. at 18. This Court has noted these rules also in countless other decisions. *See, e.g., Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S.

It is no exaggeration to say that rarely in a litigated case does one find as long and consistent a history of administrative statutory interpretation by the agency charged with the law's administration as was established in the record here (*see* pp. 7-9, *supra*), all developed before any controversy existed between the water users and the United States.[17] The court below did not dispute, and even acknowledged, this history, for it noted "[t]he record of consistent interpretation over successive years cited by plaintiffs." (App. A at 31a.) However, it completely ignored the above rules of statutory construction by simply brushing off the evidence presented as but

> "a manifestation of the tendency of an idea, once introduced, to become ingrained and to perpetuate itself in communications in a bureaucracy." (*Id.*)

The Court of Claims, or indeed any court, could describe—and dismiss—virtually any history of longstanding administrative interpretation with these very same words. They would always apply. If the rule of construction did not warrant application here, it would never have to be invoked, and the Court of Claims would be free to ignore it at will.[18] The lower courts should not be

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267, 275 (1974); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 739-40 (1950); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933); *Kern River Co.* v. *United States*, 257 U.S. 147, 154 (1921); *Kindred* v. *Union Pacific R. R. Co.*, 225 U.S. 582, 596 (1912); *Hastings & Dakota R.R. Co.* v. *Whitney*, 132 U.S. 357, 366 (1889); *United States* v. *Burlington & Mo. River R.R. Co.*, 98 U.S. 334, 341-42 (1878).

[17] Rarely also does one see an administrative agency, after so many years, reverse its position as suddenly and completely as did the Department of the Interior in its 1968 Solicitor's Opinion (App. A at 33a-34a), when it finally focused on the possible "cost" of its earlier position under the fifth amendment.

[18] Then, however, the interpretations and representations of a government agency, even in the area of its special expertise, could never be relied on, no matter for how long the views were held. The officials involved would have no reason to feel bound by the views and promises of their predecessors, for they could reverse these whenever the convenience of the government so required.

allowed to so lightly dismiss such well established rules of construction whenever the rules stand in the way of the result which the court otherwise prefers for some unstated reason. To rectify this action by the Court of Claims, its decision should be reviewed by this Court.

III. THE LONGSTANDING ADMINISTRATIVE INTERPRETATION HERE INVOLVED WAS REASONABLE, AND IN FACT WAS CORRECT

The principle of *Udall* v. *Tallman*, *supra*, applies of course only to administrative interpretations that are reasonable. The agency views on which the water users here relied for so long not only were eminently reasonable, they were totally correct. The ruling of the Court of Claims thus was clearly in error.

First, the court concluded that, without regard to the 1940 contract, the 1902 and 1910 Acts together never were effective to allow title to pass to the water users. (*See* App. A at 16a-17a.) However, the plain language of the two Acts dictates otherwise. The 1902 Act provides that (a) the management and operation of the "*irrigation works*" shall pass to the water users "when the payments required by this Act are made for the major portion of the [irrigated] lands," while (b) the title, management and operation of the "*reservoirs and the works necessary for their protection and operation*" shall remain in the government "until otherwise provided by Congress." 43 U.S.C. § 498 (App. B at 35a). The 1910 Act in turn represents an instance where Congress so "otherwise provided." It states that "title management and control" of the Project Lands "shall pass" to the water users when the management and operation of the "*irrigation works*" pass under the 1902 Act, *i.e.*, when the payments are made for the major portion of the irrigated lands. (App. C at 36a.) While the court below

found this language to be ambiguous (App. A at 15a) and concluded that the 1910 Act's reference to the 1902 Act "is better construed" to refer to the need for yet another act of Congress,[19] the language of the provision seems clear on its face.[20]

Moreover, unlike the lower court's ruling, the longstanding administrative interpretation the water users relied on is consistent with the interpretation of the 1910 Act by its author, as set forth in his letter to the water users (App. E at 38a) which forms the only useful legislative history available on the Act. (*See* App. A at 10a-14a.) Clearly therefore the 1910 Act was intended to convey title.

The court below also was wrong in concluding that, however one views the 1910 Act, "as a result of the contracts entered into with the United States in 1928 and particularly in 1940, plaintiffs conveyed or relinguished to the United States and were divested of any property interest, legal or equitable, that entitles them to recover for a taking of the project lands." (App. A at 3a.) This conclusion, reached with virtually no explanation, is indefensible. The 1910 Act did not merely give the water users a future right to "title." It extinguished the Indians' "right, title, and interest" in the land, gave the

[19] App. A at 16a-17a. It based this view on the position of the government which, contrary to its longstanding administrative interpretation, the government took for the very first time in this litigation. Even the 1968 Solicitor's Opinion, which concluded that in the 1940 contract the water users gave up all right to compensation once the Project costs were repaid, conceded that the 1910 Act was within the scope of the "otherwise provided by Congress" provision of the 1902 Act. (*Id.* at 33a.)

[20] The court's reading of the 1910 Act also renders the Act's key language, on passage of title, effectively superfluous, thus violating yet another fundamental rule of construction, that laws be construed if possible to give effect to all their provisions. *United States* v. *Campos-Serrano*, 404 U.S. 293 (1971); *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303 (1961).

water users the *immediate* right to "all receipts from said lands, as rentals or otherwise," and provided that they pay for the land. (App. C at 36a.) The water users also operated and managed the lands, together with the rest of the Project, and had the right to dispose of net profits under Section 4 of the Fact Finder's Act of 1924. (*See* App. D at 37a.) Thus, the right to "title," as used in the 1910 Act, was only part of what the water users possessed. As the government officials recognized, the water users, even without legal title, owned beneficial and equitable interests in the lands which continued to grow as the costs were repaid. And in the 1940 contract, they agreed only that "title" would remain in the United States until otherwise provided by Congress. (*See* App. F at 56a.) There simply is no basis for claiming that in the 1940 contract any additional rights were waived.[21] As the 1950 Solicitor's Opinion and the government's other interpretations correctly concluded, the water users after 1940 still had beneficial title to the land.[22] They also continued, based on the government's representations, to pay the cost of the land. It is therefore totally unreasonable to suggest that in 1974, when they finally finished paying for the land, they no longer held any compensable interest therein. The longstanding views of the Department of the Interior to the contrary were very reasonable. Indeed, they were wholly correct, and the Court of Claims erred in not following them.

[21] The Court of Claims suggested that the relinguishment of property interests occurred also through the 1928 contract, but it never explained this statement and petitioners know of nothing in the 1928 contract on which the conclusion even arguably might be based.

[22] *See* App. G at 67a and pp. 7-9, *supra*. The record is clear that the water users had no intent in 1940 to give up any of their valuable ownership interests. They thought they were waiving no more than their right ultimately to receive a patent to the land. The government's intent was no different. (App. A at 28a-29a.)

IV. THE CASE PRESENTS ALSO AN IMPORTANT QUESTION UNDER THE GENERAL RECLAMATION LAWS

If the water users in the 1940 contract did in fact forfeit whatever special interests they might once have derived from the 1910 Act, their rights and interests in the Project, including the Project Lands, became like those at many other projects and were governed by the general Reclamation Laws, including the 1902 Act, *as amended*, 43 U.S.C. §§ 371 *et seq.*, and, as to the right to manage the Project and receive income, particularly by Section 4 of the Fact Finder's Act of 1924, 43 U.S.C. §§ 500-501 (App. D at 37a), as well as the Reclamation Project Act of August 4, 1939, 53 Stat. 1187. Thus, the ruling of the court below means that under these general laws, the water users, although they have fully repaid all construction costs, have no compensable property interest whatsoever in the land, or in the income to be generated therefrom. This conclusion applies not just to the Project Lands, but to the rest of the Project as well, and to the many other reclamation projects governed by the very same set of laws.

The Strawberry Project was one of the first to be constructed under the 1902 Act, and it is one of the first to finish fully repaying the constructions costs.[23] Others eventually will follow suit. The entire question of what rights (other than water rights) the water users have in a project fully paid for is one this Court has never addressed.[24] This case presents an ideal and timely opportunity for the Court to fill this decisional vacuum.

[23] *See* U.S. Dept. of the Interior, *Federal Reclamation Projects—1977—Finances & Physical Features—Statistical Appendix II* at 7-9 and 43-44. As of September 30, 1977, of some 200 federal reclamation projects, only ten, including the Strawberry Project, had finished repaying all reimbursable project construction costs. (*Id.*)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[24] In *Ickes* v. *Fox*, 300 U.S. 82, 95 (1937), the Court noted in passing that the water rights became the property of the landowners "wholly distinct from the property right of the government in the irrigation works," but did not address the question here presented. So, too, in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958), the Court dealt with a question of a water district's right to title to the distribution system on full repayment, but the case, unlike the instant case, involved a multi-purpose project, with repayments under 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(e), rather than under 9(d), and only a small part of the cost of the project was ever to be repaid by the water users. 357 U.S. at 278, 283 and 286.

Appendices

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 452-73

(Decided December 12, 1979)

STRAWBERRY WATER USERS ASSOCIATION, ET AL.

v.

THE UNITED STATES

Foster DeReitzes, for plaintiff. *Glen A. Wilkinson*, attorney of record. *Wilkinson, Cragun & Barker*, of counsel.

David Waters, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, and KUNZIG, *Judge*.

OPINION

PER CURIAM: This case comes before the court on the exceptions by both parties to the recommended decision and opinion of Trial Judge Kenneth R. Harkins, rendered on the parties' cross-motions for summary judgment. After hearing oral argument, and after considering the exceptions and briefs of the parties and the

record, the court hereby adopts the trial judge's opinion, but with modifications and deletions as follows:

The trial judge found that the United States holds title to the lands in dispute and that the enlargement of the reservoir or the use of 20 acres for fishery activities did not constitute a taking of plaintiffs' property which would entitle them to compensation. We agree with that much of his holding.

However, the trial judge also held that plaintiffs have an interest in revenues from the land in dispute, but that in the absence of a showing that they would lose revenues currently being credited to the project, they would not be entitled to recover. Defendant challenges this portion of the trial judge's decision on the ground that there is no issue in this case regarding the right of the plaintiffs to revenues from the project, and that the court has no right to issue a declaratory judgment with respect to such revenues. Plaintiffs except to the ruling that the United States holds title to the lands in controversy. They also challenge those portions of the trial judge's opinion in which he ruled that even after construction costs are fully repaid, profits from the project lands may not be distributed to individual water users. Plaintiffs assert that they are seeking a money judgment for a Fifth Amendment taking here; that the right to future distributions is not in issue, and that in any event, the court has no jurisdiction to rule on the question of such distributions. At oral argument, plaintiffs also made it clear that they are not suing to recover damages for a breach of any contractual right.

We agree with the parties that the right of the plaintiffs to future revenues, including the distribution of profits, is not an issue in this case and we have attempted to delete those portions of the trial judge's opinion which make conclusions of law on these questions. If any remaining portions of the trial judge's opinion should be construed as a ruling on these questions, we emphasize that we intimate no opinion, declaratory or otherwise, on the right of the association or the individual plaintiffs to future revenues or the right of any of the water users to distributions of profits.

Regardless of what interests the plaintiffs may have had in the project lands prior to 1928, we hold that as a result of the contracts entered into with the United States in 1928 and particularly in 1940, plaintiffs conveyed or relinquished to the United States and were divested of any property interest, legal or equitable, that entitles them to recover for a taking of the project lands in issue in this case and that there was no taking of a property interest owned by them in such lands.

Accordingly, defendant's motion for summary judgment is granted for the reasons stated; plaintiffs' motion for summary judgment is denied, and their petition is dismissed.

OPINION OF THE TRIAL JUDGE

HARKINS, *Trial Judge*: This taking case is before the court on cross-motions for summary judgment, and, by stipulation, the issue is limited to the nature of plaintiffs' ownership interest in the lands in dispute.[1] All facts relevant to the liability issue are set forth in the motion papers or in the pretrial materials referenced therein; there is no genuine issue as to any material fact.

Plaintiffs are the Strawberry Water Users Association, which represents approximately 94.8 percent of the

[1] Plaintiffs' petition was filed December 9, 1974, and the parties completed elaborate pretrial preparation. A dispute arose about a stipulation on the liability phase and on June 3, 1977, the court ordered the stipulation be stricken, with the initial determination and recommendation on any motions for summary judgment to be made by the Trial Division pursuant to Rule 54(a).

water rights in the Strawberry Valley Reclamation Project (the "project") located in Wasatch County, Utah, and 99 individuals who own approximately 3 percent of the water rights in the project.[2] Plaintiffs seek just compensation under the Fifth Amendment for the value of lands which have been taken, or are in the process of being taken, by the United States by enlargement of the Strawberry reservoir as part of the Central Utah Project, in the program authorized in 1956 to develop the upper Colorado River basin.[3] The enlargement of the Strawberry reservoir was caused by construction of the Soldiers Creek Dam, which construction began in November 1970 and was substantially completed in October 1973.

Prior to its enlargement, the Strawberry reservoir covered about 8,400 acres, of which about 8,240 acres were part of the lands in dispute; the enlarged reservoir will cover approximately 22,000 acres, and will utilize about 13,500 acres of the lands in dispute that surround the present reservoir. In addition to enlargement of the reservoir, effective May 30, 1973, the Bureau of Reclamation assumed full jurisdiction and management of approximately 20 acres of the disputed lands for the purpose of continuing certain fishery activities with the State of Utah. Plaintiffs contend they hold legal and

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[2] The project was initiated in 1906 by a corporation named the Strawberry Valley Water Users Association; the contract between the United States and the association was terminated in 1914 and that corporation subsequently was abandoned. Plaintiff association was organized on April 25, 1922; and stock was issued to persons holding water rights in the project in the ratio of one share of stock for each acre-foot of water rights held. The association now has approximately 1,200 stockholders, each of whom own land to which water rights are appurtenant. Approximately 207 individuals own the remaining 5.2 percent of the water rights, for which no stock has ever been issued; 99 are individual plaintiffs, and the remaining 108 individuals, who hold 2.2 percent of the project water rights, are not participants in this action.

[3] Act of April 11, 1956, 70 Stat. 105, as amended by the Act of September 30, 1968; 43 U.S.C. §§ 620 *et seq.*

equitable interests in the disputed lands that entitle them to compensation for the entire 22,000 acres that will be utilized by the enlarged reservoir, and for the 20 acres taken for fishery activities.

The United States holds title to the lands in dispute and will continue to hold title until Congress provides otherwise. The United States has not taken a property interest, legal or equitable, which the plaintiffs have in the lands at issue, and they are not entitled to recover compensation for a taking of a property interest under the Fifth Amendment.

Plaintiffs' claim is concerned with the status of lands withdrawn from an Indian reservation in 1905 for use in a federal reclamation project. In addition to the difficulties presented by changes over a 70-year history, the legal problem is compounded by ambiguous laws coupled with ambiguous contracts.

The federal reclamation program was initiated in 1902 to create farms on arid lands in order to continue to make tillable acreage available for homesteading. As conceived, the reclamation program provided for the United States to establish a reclamation fund in the Treasury which would finance the construction of reservoirs and irrigation works. Homesteaders would take up private farms on the irrigated lands and would pay an annual charge computed so as to return to the reclamation fund, over a 10-year period, the estimated construction cost of the project; and, through an organization, the water users would take over management and operation of the irrigation works (but not reservoirs) when the required payments had been made for a "major portion of the lands" irrigated. This standard was interpreted to mean a point when 51 percent of the construction costs had been repaid.

By 1910, the federal reclamation program was in serious trouble. Demands on the reclamation fund were be-

ginning to exceed the monies generated from the sale of lands from the public domain, and reclamation projects that had been undertaken were behind schedule with the result that anticipated return to the reclamation fund was not being generated. Passing years, which have included two wars and a depression, have demonstrated the original planning for reclamation of arid lands lacked feasibility. Circumstances have required many changes in reclamation concepts and projects; planned schedules could not be met; moratoria have suspended repayment obligations; and, ultimately, the repayment period has been extended to 30 years on varying bases.

The Strawberry Valley Reclamation Project was authorized by the Secretary of the Interior on December 15, 1905; preliminary work was begun in 1906; construction was substantially completed in 1915; and the first water was delivered in that year. The project was operated and maintained by the United States until 1926, when, effective October 1, care, operation, and maintenance of the project were transferred to plaintiff association. On November 30, 1974, plaintiff association paid to the United States the final installment due on the $3,499,734.22 construction costs which had been charged to the project.

In addition to the reclamation laws, and the extended course of dealings on the project, the interests of plaintiffs and the United States in the disputed lands are defined in a 1910 act of Congress, by a contract dated September 28, 1926, a supplemental contract dated November 20, 1928, and by an amendatory contract dated October 9, 1940, which expressly supersedes the 1926 and 1928 contracts. At the time the 1940 contract was executed, plaintiff association had not paid the major portion of the construction costs charged to the project.

Prior to 1910, the lands in dispute (variously referred to as "Indian lands," "watershed lands," "grazing lands," or "project lands"), a parcel that totals 56,668.51 acres,

were a part of the permanent reservation for the Uintah Indians which was set apart by Presidential proclamation on October 3, 1861, and by the Act of May 5, 1864.[4] In 1902, Congress authorized allotments of lands to Indians on the Uintah Reservation, with unallotted lands to be restored to the public domain.[5] In connection with the opening of the Uintah Indian Reservation, Congress provided:[6]

> That before the opening of the Uintah Indian Reservation the President * * * may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, * * *.

Before the reservation was opened for entry, effective August 28, 1905, the President, by proclamation on August 3, 1905, withdrew specifically described lands for a reservoir site "necessary to conserve the water supply for the Indians or for general agricultural development."[7]

The lands in dispute in 1907 and 1909 were included in two first-form withdrawal orders by the Secretary of the Interior in order that they would be used for a reservoir site in the Strawberry Valley project. The Indian lands so withdrawn could not be opened for public entry and private ownership. The lands to be irrigated

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[4] 13 Stat. 63.

[5] Act of May 27, 1902, 32 Stat. 245, 263.

[6] Act of March 3, 1905, 33 Stat. 1048, 1070.

[7] 34 Stat. 3141. By proclamation on August 14, 1905, the reservoir site description was modified and the area of land withdrawn was reduced to 60,069.51 acres. 34 Stat. 3143. On March 13, 1907, and November 12, 1909, the Secretary of the Interior, pursuant to section 3 of the Reclamation Act, included 56,668.51 acres in two first-form withdrawals for the benefit of the Strawberry Valley project; the remaining 3,400 acres were not affected by the Secretary's reclamation withdrawal orders.

by the project, and which are now privately held, are located across a mountain range from the Strawberry reservoir and the disputed lands, which constitute about 54 percent of the reservoir's watershed. As enacted in 1902, the Reclamation Act provided that title to, and management and operation of, the reservoirs and works necessary for the protection and operation of reservoirs should remain in the Government until Congress provided otherwise.[8]

After the lands had been set aside for the Strawberry Valley project, it was discovered that the public was using the watershed lands for grazing, without compensation to either the Indians or to the water users association. With the consent of the chief engineer on the project, the water users association started to grant leases to graze on the watershed lands and arranged annual rentals of about $10,000. By 1909, about $30,000 from this source had been paid to the Commissioner of Indian Affairs for the benefit of the Indians. In 1909, the Strawberry Valley project was investigated by a committee of the United States Senate, and at a meeting on November 3, 1909, at Spanish Fork, Utah, the president of the Strawberry Valley Water Users Association recommended that a way be found to have the grazing revenues applied to the project.[9] This was accomplished in 1910 by Senator Sutherland in an amendment to the act making appropriations for the Bureau of Indian Affairs.[10]

[8] Section 6 of the Reclamation Act as enacted provided:

"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided,* That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided,* That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

The Sutherland amendment for the Strawberry Valley project (the "1910 act") consists of four sentences that: (1) extinguished Indian title in the lands by payments from the reclamation fund of $1.25 per acre; (2) included such payments in the construction costs of the project to be reimbursed by the owners of irrigated lands; (3) credited concurrently "all receipts from said lands, as rentals or otherwise" to the owners of lands irrigated by the project; and (4) provided for disposition of the "title, management and control" of the lands in the future. Although the 1910 act has the virtues of brevity and superficial simplicity, its disposition of the "title, management and control" of the watershed lands is ambiguous.

The last sentence of the 1910 act provides:

> * * * All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title

[9] Henry Gardner, president of the 1906 Strawberry Valley Water Users Association, testified to the Senate committee, which included Senator Sutherland: "* * * It has been for a year or two grazed by the public without any compensation to the Indians or to us. We took the matter up with the chief engineer of this project, the Reclamation project of the United States, and it was left with the project here to dispose of it, utilize it as they saw fit. * * * It is a financial loss. We do not feel it is an injury to the Indians, but we would like to pay them off and get rid of them as fast as we can. We don't want to keep them indefinitely, because we feel like we will have enough to keep ourselves in the future. It is a financial proposition, and it seems to me that thirty thousand dollars of that money has now gone to the Indian department, that if we could get enough appropriation through the Reclamation project and charge up to the project to pay the Indians and get a deed and have it turned over to the Government for the project, that the revenue from that would not only pay the money back in, but would be a source of income and profit to the project in the end."

[10] Act of April 4, 1910, 36 Stat. 269, 285.

> management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act.

The ambiguity arises from the scope of the reference to the Reclamation Act. Both parties see the reference as to section 6 of the 1902 act. Plaintiffs construe the 1910 act as the implementation of the "otherwise provided by Congress" requirement in the second proviso of section 6 of the 1902 act, which applies to "reservoirs and the works necessary for their protection." Transfer of title to all of the watershed lands, including the reservoir, would be triggered in the future when management and operation of the irrigation works under the 1902 act standard passed to the owners. Defendant views the reference as to both provisos of section 6. Passage of management of and operation of the irrigation works is separate from title, management and operation of reservoirs, and, until Congress provides otherwise, the 1910 act excludes passage of title to so much of the watershed lands as are contained in the reservoir and the surrounding areas necessary for its protection and operation. In addition, defendant contends that section 10 of the 1902 act provides the Secretary of the Interior discretion to determine which lands the United States would retain for reservoirs and other works necessary for their protection. That determination, according to defendant, was made in 1940, at which time plaintiffs agreed that title to all of the watershed lands, which were still publicly owned, would remain in the United States and that those lands would be governed by the laws pertaining generally to reclamation projects.

The legislative history of the 1910 act is scant. The legislative history that exists indicates Congress was concerned mainly with payments to the Indians for ex-

tinguishment of their title, and with the transfer of land to provide a site for the Strawberry Valley project reservoir. These objectives were to be attained with no depletion of the reclamation fund for the cost of the land. On February 14, 1910, and on March 11, 1910, the Senate had passed provisions for the reclamation fund to be repaid for the watershed lands in a form that differed from the last two sentences that appear in the 1910 act.

S.5926, a bill to make available certain lands on the former Uintah Indian Reservation under the Reclamation Act, was introduced by Senator Sutherland in January 1910, and was referred to the Committee on Irrigation and Reclamation of Arid Lands. It was reported by the committee on February 14, 1910, and passed the Senate on that date. The committee report explained: [11]

> The body of the land referred to in the bill is necessary for use in connection with the Strawberry Valley reclamation project in Utah. The project includes the construction of a reservoir for the storage of water, which, when completed, will submerge several thousand acres of land. The remainder of the land lies around and immediately adjoining that portion which will be submerged. Numerous small streams, coming from the north and south, traverse this surrounding land and constitute the source of supply for the reservoir. In order to protect the reservoir and the streams it is necessary that the same authority which controls the reservoir should control this area lying about it. The land is grazing land, and owing to its great elevation above sea level can not be made use of for agricultural purposes.

Discussion on S5926 in the Senate reflects a concern that the reclamation fund would be depleted. At that time the troubles in the reclamation program caused by inadequate financing for approved projects were generally recognized, and Congress was being requested to augment

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[11] S. REP. NO. 219, 61st Cong., 2d Sess. 1 (1910).

the reclamation fund by direct appropriations in the magnitude of $30 million.[12] Senator Sutherland assured the Senate the reclamation fund would be repaid and that the lands would constitute as much a part of the Strawberry Valley project as the reservoir itself.[13]

When the appropriations bill for the Bureau of Indian Affairs (H.R. 19028) passed the House of Representatives on February 22, 1910, it contained no provision relevant to reservoir lands for the Strawberry Valley project. In the Senate, however, Senator Sutherland on January 31, 1910, had introduced an amendment to H.R. 19028 which contained the language of S.5926. The Senate Committee on Indian Affairs reported H.R. 19028 with Senator Sutherland's amendment on March 8, 1910, and, as so amended, H.R. 19028 passed the Senate on

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[12] 45 CONG. REC. 1822 (1910); see also HISTORY OF PUBLIC LAND LAW DEVELOPMENT, Public Land Law Review Commission. Nov. 1968, at 663-70.

[13] 45 CONG. REC. 1822 (1910). The following exchange took place:

"Mr. SUTHERLAND. These are public lands, but they are charged with a trust for the benefit of the Indians.

"Mr. HEYBURN. Then, should not that trust be discharged out of the Treasury of the United States? Is there any justification for diverting the proceeds of the sale of public lands from the reclamation fund to pay a private debt?

"Mr. SUTHERLAND. These lands ultimately go into this project and constitute a part of it.

"Mr. HEYBURN. But if the Senator will allow me—

"Mr. SUTHERLAND. If the Senator will permit me, they constitute a part of the project just as much as the reservoir itself or the work which is constructed in connection with the reservoir. It is proper that the reclamation fund should bear the burden of it, precisely as it bears the burden of constructing the reservoir or the tunnel through the mountain which is connected with the reservoir. I will assure the Senator that the reclamation fund will not suffer. Before the tunnel is constructed the rental arising from the land, which will be returned to the reclamation fund, will be a large portion of the money that has been paid."

March 11, 1910. The Indian Affairs Committee Report[14] included a February 18, 1910, letter in which the Secretary of the Interior approved inclusion of the amendment in the appropriations bill.[15]

As passed by the Senate, the Sutherland amendment to H.R. 19028 (as in S.5926) contained three sentences. The third sentence provided for the extinguishment of the Indian title:

> * * * All right, title, and interest of the Indians in the said lands are hereby extinguished, and the same shall be available in connection with the operations under the reclamation Act, and any proceeds arising therefrom as rentals or otherwise shall be covered into the reclamation fund.

Although the Senate-passed language would assure that all of the Indian title to the watershed lands would be available in connection with the Strawberry Valley project reservoir, which was specifically identified in the first sentence, the last sentence could be construed to mean that any proceeds arising from the lands would go into the reclamation fund generally, where they could be used on other projects, in other states. In conference committee, the last sentence of the Sutherland amendment to H.R. 19028 was rewritten into two sentences. The sentences

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[14] S. REP. NO. 357, 61st Cong., 2d Sess. 24 (1910).

[15] The Secretary's letter stated:

"On February 10, 1910, the department reported on Senate bill No. 5926 to the Hon. Thomas H. Carter, chairman of the Committee on Irrigation and Reclamation of Arid Lands, which has the same object as the amendment now under consideration.

"No part of the land to be affected by the amendment is allotted to Indians, and they do not live in the vicinity. This department knows of no cause for objecting to the taking of the land for the purpose covered by the bill. The price to be paid is the lawful rate of compensation to the Indians for this class of land, and I have no objection to the amendment being included in the Indian appropriation bill."

specifically provided that any revenues from the watershed lands would be applied to the costs of the Strawberry Valley project, and related the transfer of the Indian title to the terms of the Reclamation Act.

The conference committee's amendment (No. 136) was explained by the managers for the House of Representatives as follows:

> No. 136 provides for extinguishing the Indian title to a reservoir site used for a reclamation project in Utah. The appropriation of approximately $63,750 is to be paid from the reclamation fund.

The conference committee report was agreed to by the Senate without a vote on March 24, 1910, and by the House on March 25, 1910.[16] There was no discussion in either body of amendment No. 136.[17]

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[16] 45 CONG. REC. 3692 (1910); 45 CONG. REC. 3771 (1910).

[17] The Sutherland amendment, as amended by the conference committee (the "1910 act"), in its entirety reads:

"That the Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of one dollar and twenty-five cents per acre for the lands in the former Uintah Indian Reservation, in the State of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, chapter fourteen hundred and seventy-nine, and which were by the Scretary of the Interior withdrawn for irrigation works under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project. Such payment shall be made in five annual installments, and the moneys paid shall be subject to the same disposition as the proceeds of the sales of lands in the former Indian reservation. All such payments shall be included in the cost of construction of said Strawberry Valley project to be reimbursed by the owners of lands irrigated therefrom, all receipts from said lands, as rentals or otherwise, being credited to the said owners. All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act."

What Congress intended in the last sentence of the 1910 act for disposition in the future of "title management and control" of the watershed lands cannot be divined from the language of that sentence alone. The sentence as readily may mean that the owners in the future are to get "title management and control" of the reservoir on the happening of an event within the terms of the Reclamation Act as it may mean that "title management and control" of the reservoir, within the terms of the Reclamation Act, is to remain in the Government until Congress otherwise provides. In these circumstances, the intent of Congress must be found from the 1910 act in its entirety and in the light of the factual context that existed at that time. In cases that involve statutory ambiguity, guidance is found in the provisions of the whole law, the circumstances that existed at the time it was passed, and the objectives sought in the legislation.[18]

In 1910, the Strawberry Valley project was in its initial stages, and construction would not be completed for 5 years. It is clear that Congress intended the Indians were to be paid for the lands, and that the lands were intended to be used for a reservoir and protection of its watershed. Nothing is found in the legislative history of the 1910 act, and no contemporaneous statement now available was made by any person concerned with its enactment, however, which would indicate any intention, at any time, to confer on the water users title, management or control of the reservoir or the works necessary for their protection. In 1910, Congress was concerned that funds from the reclamation fund used to make the purchase from the Indians would be reimbursed from income expected to be derived from the lands. Disposition of title, management and control of the watershed lands was to pass in accordance with disposition of

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[18] *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *Akins* v. *United States*, 194 Ct. Cl. 477, 483, 439 F.2d 175, 177 (1971).

lands in the reclamation program. On two occasions the Senate approved language that would accomplish this purpose, and nothing suggests that the amendment made by the conference committee was intended to do more than clarify these objectives. The conference committee amendment relative to future disposition of "title management and control" should not be construed to do violence to the provisions of the 1902 act applicable to reservoir lands, or to enlarge the purposes sought by the sponsors of the Sutherland amendment and the purposes enunciated by the President and by the Secretary of the Interior for the withdrawals from the Indian reservation.

In the reclamation program in 1910, management and operation of the irrigation works of a project were planned to pass to the owners of the lands irrigated by the project when the payments required by the act had been "made for the major portion of the lands irrigated from the waters of any of the works" in the project.[19] Title to, and management and operation of, all reservoirs and works necessary for their protection and operation, however, were required to remain in the Government until Congress provided otherwise. The lands from the Indian reservation were obtained for the purpose of utilizing them for a reservoir; and the reservoir that was to be constructed would occupy both lands from the Indian reservation and other lands which had been withdrawn from the public domain for the benefit of the project. The watershed of the reservoir needed protection for both the former public domain lands and the Indian lands. In these circumstances, the reference to the Reclamation Act in the last sentence of the 1910 act is better construed to mean that title, management and

[19] The meaning of the phrase "major portion of the lands" in the 1902 Reclamation Act is ambiguous. Throughout the history of the Strawberry Valley project, however, this phrase was interpreted by the parties as meaning the point at which 51 percent of the project construction costs were repaid.

control of the watershed lands were to be subject to the same disposition in the future as applied to other lands in the reclamation program that were utilized for reservoirs and were necessary for the protection of reservoirs.

The 1910 act's provisions for disposition of revenues from the watershed lands were separate from, and different from, the provisions related to title, management and control of the lands. The Indians were authorized to be paid in five annual installments, and such payments were to be included in the project's construction costs when made. Although disposition of title, management and control of the watershed lands was deferred to the future, all revenues from the lands when received were subject to the landowners' right to have them credited to the construction costs.

From 1910 to October 1, 1926, the Bureau of Reclamation managed operations in the project. During this period, the Bureau accumulated net revenues of $160,715.01 from its administration of leases on the watershed lands.[20]

Net profits from the watershed lands, before taxes and depreciation, from 1926 to October 31, 1976, totaled $1,709,239; of which $757,578 were from grazing leases; $466,838 were from recreational activities; and $484,823 were from oil and mineral exploration leases. Net profits of $2,966,043 were credited to the plaintiffs from the two hydroelectric power plants which are on the project but not on the watershed lands. Since November 30, 1974, the date on which the final installment due on the construction costs was made, to October 31, 1976, net profits from activities on the watershed lands and from the power plants amount to approximately $400,000 before taxes and depreciation.

[20] In the 1926 contract, this amount had not been credited to the construction account repayment, but was to be taken into account in the July 1, 1930, restatement of financial relations.

The right to have the revenues from the watershed lands credited when received to its construction cost account created a status in the Strawberry Valley project that was unique. This status vested on enactment of the 1910 act; it made management and control of the watershed lands and the reservoir different from management and control of reservoirs and their adjacent withdrawn or acquired lands in other reclamation projects. Protection of this unique status in revenues from the watershed lands created confusion in the theories and concepts related to the transfer of title, management and control of the watershed lands which the 1910 act deferred to the future. This confusion was intensified by the change in the reclamation program in 1924 in which care, operation and maintenance of a project was transferred to the water users association before 51 percent of the construction costs had been repaid.

Protection of its right to watershed revenues involved the water users association in disputes from the beginning. Some disputes were concerned with internal reclamation program matters, such as the right to grant leases or other administrative prerogatives or compliance with Reclamation Bureau recreation policies. Other disputes were concerned with attempts by outsiders to gain control over or to use the lands. In these conflicts, the parties used terminology and concepts that would support the positions that were then at issue. In the process, argument applicable to the status of the right to current revenues became intermingled with ideas about the status of title and control in the future. As a result plaintiffs' efforts to protect their right to present revenues from the watershed lands and defendant's administration of the reclamation program are reflected in documents that are permeated with concepts about "vested" legal rights from the 1910 act, "purchase and sale" of watershed lands, and "trustee's obligations" relative to "equitable title." These concepts became ingrained in the

attitudes of the parties and in their communications over the years; they lacked precision in use and their content varied with the circumstances.

The most serious and continuous threat to the water users' right to revenues from the watershed lands came from stockraising interests in Wasatch County who wanted access to the lands for grazing. This controversy endured from 1908 to 1930; throughout this period the lands were leased under written leases executed through the Bureau of Reclamation. The controversy included attempts by the Wasatch County Grazing Association to get Senator Sutherland to consent in 1915 to a modification of the 1910 act, and an attempt in 1922 to add the lands to the Uintah National Forest and thereby transfer jurisdiction over grazing permits to the Forestry Service in the Department of Agriculture. The stockmen in 1925 brought suit in the District of Columbia against the Secretary of the Interior to restrain the Secretary from crediting grazing revenues to the Strawberry Valley project, and to transfer to the reclamation fund all such revenues previously so credited. In all of these disputes, Bureau of Reclamation officials supported the positions taken by the water users.

Senator Sutherland, in a letter dated December 31, 1915, to the water users, reported on his conversations with Interior's Assistant Secretary in charge of grazing leases on the watershed lands. Senator Sutherland stated that the association's fears that the lands would be thrown back in the forest reserve were groundless because he had reviewed the 1910 act with the Assistant Secretary who had assured him that the Interior Department "had not the remotest idea of interfering with the rights which this law grants you and he agreed with me that the law gives you a vested right in these lands. I drew it myself with great care with the intention to accomplish this result." With respect to the last two

sentences of the 1910 act, Senator Sutherland's letter states:

> * * * So you see the lands are bought and paid for and the Indian title is extinguished. The owners of the water rights reimburse the reclamation fund for these lands the same as they do for the irrigation project, and when the final payment is made by the owners, the title, management and control of these lands passes to the water owners at the same time that the management of the irrigation works passes to them. Under this law there is no doubt that the Interior Department has no power to interfere with the status of the lands and my opinion is that even Congress itself could not deprive you of the rights conferred because those rights have become vested by payment. At any rate, you may be sure that as long as I am in the Senate, I shall not permit your rights to be interfered with without resistance to the full extent of my ability. However, I do not think that any such attempt will be made, and if made, I have no doubt it would be unsuccessful.

Plaintiffs cite this letter to show the intent of Congress in 1910. Statements made by a bill's author 5 years after enactment form a hazardous base for inferring the intent of an earlier Congress.[21] The reed becomes more slender when the statements are made in the context of a vigorous dispute. In an atmosphere as volatile as the one that surrounded the reclamation program in 1915, Senator Sutherland's statements relative to vesting of title to reclamation program reservoirs after full repayment of construction costs are not persuasive. His interpretation, however, appears with regularity in subsequent reclamation program administrative records.

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[21] *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 349 (1963); *United States* v. *Price*, 361 U.S. 304, 313 (1959); *Appalachian Regional Hospitals, Inc.* v. *United States*, 217 Ct. Cl. ——, ——, 576 F.2d 858, 869 (1978).

In the early years of the reclamation program, federal administrators viewed the Government's role as a temporary trust relationship, with title to the projects ultimately to be transferred to the water users. In 1921, for example, the Secretary of the Interior was advised he had authority to grant a railroad right-of-way over the watershed lands without specific direction from Congress, notwithstanding the unique status created by the 1910 act. The Solicitor of the Department compared the 1910 act with section 6 of the 1902 act and noted that, while there was a slight difference between them, no material or controlling distinction could be made as to the purpose intended. The memorandum dated October 18, 1921, stated:

> * * * But even if title to the reservoirs in this case may ultimately pass to the owners of the irrigated lands without further act of Congress, nevertheless the relationship between the Government and the water users is the same in legal effect as that existing in respect to other projects under the general reclamation act. In all such cases, the Government holds the title as trustee for the benefit of the water users under the project, with a view of ultimately relinquishing title and management and giving full control to the owners of the irrigated lands. As such trustee, the Secretary is presumed to act in the interest of the prospective water users whose lands must bear the burden of the cost of the project.

In a letter dated September 7, 1922, the Department of the Interior commented on a bill to transfer the watershed lands to the Uintah National Forest. This comment notes that the bill would repeal the 1910 act and its effect would be "to divest the landowners of such title and interest as they acquired under the said act of 1910 and also the benefits of the obligation for repayments assumed by them as well as the benefits of the payments

already made." Enactment, further, would deprive the landowners of the rentals which could be secured from the watershed lands "after they have obtained full title which will pass under the law by reason of complete payment for the project." The controversy around the question of whether the 1910 act modified the 1902 reclamation law "to the extent of passing title to these lands instead of holding title as a sort of trust, as implied by the reclamation law in general" was noted and the following statement made:

> Neither in this section of the reclamation law nor in any other enactment regarding it is there a provision for the transfer of title to the project works and property and the discussion revolved around the question whether the act of 1910 being subsequent to the act of 1902 modified the reclamation law to the extent of passing title to these lands instead of holding title as a sort of trust, as implied by the reclamation law in general.
>
> For the present discussion it is immaterial whether the law actually requires the title to pass, because the act of 1910, in connection with the reclamation law in general, must be construed as transferring to the landowners a valuable right for which they have assumed an obligation to make full payment and have up to date made payment substantially in accordance with the contractual obligations assumed and have in fact made payment of a considerable part toward the amount due on account of these lands.

The continuing controversy between the water users and the stockmen of Wasatch County was described in a letter dated December 29, 1924, from the water users association to Senator Smoot. The letter traces use of the watershed lands for grazing purposes when they

were under the control of the Indian Bureau and after 1908, when the Reclamation Bureau took over leasing responsibility. The effects of the 1910 act and the 1924 Fact Finders Act were explained as follows:

> These lands have been brought by the United States from the Indians and the Indians have been fully paid for the lands. Under the law the water users of this project are to get the title of these lands and they have given the government mortgages upon their farms to secure the payment of their water charges and after these payments are made title to the lands will pass to them by virtue of the Act of April 4th, 1910. And under the Fact Finder's bill, Congress has during this very month, re-affirmed its intention to pass title to this land to the project water users and also to give the water users the benefit of the income from the land as fast as it is earned.
>
> It appears, therefore, that the United States had definitely committed itself on the question of disposing of these lands in such a way that it can not now retract from these committments without breaking its contract with thousands of water users on this project. Of course we do not think the United States would do such a thing.

In 1920, the water users secured the lease for the watershed lands from the Bureau of Reclamation and subleased grazing rights to the stockmen. This development was explained to Senator Smoot as follows:

> In the fall of 1920 a grazing lease upon these lands held by the Heber people, expired and they were desirous of renewing their lease and proposed to the Reclamation Officials that they be given a new lease for five years at the same price they had previously paid. Also at this time the water users told the Reclamation Officials that they wished to lease this

land themselves and were willing to pay the price previously paid by the Heber people. They also stated that they were opposed to any lease being made from the Reclamation Bureau to the Heber people direct, as the Heber people were unwilling to recognize the rights of the water users in these lands. The water users stated that if the Heber people were unwilling to recognize their rights by subleasing from the water users, then the water users would continue to object to a lease being made to the Heber people. After two conferences between the water users, the Heber people, and the Reclamation Officials were held at Provo, the Heber people finally agreed to not question the rights of the water users in these lands and to accept the sublease from the water users for a period of five years at the previous rate of payment. At this time the water users agreed to sublease to the Heber people with the explicit understanding that the Heber people would so shape their affairs so that they could withdraw completely and permanently from these lands at the expiration of the new five year lease. This lease expires at the close of 1925.

According to a memorandum dated December 9, 1930, from the Commissioner of Reclamation, the watershed lands and the withdrawn lands in 1925 had been advertised for leasing and were leased to the highest bidder, an outside stockman, for a 5-year term that would expire December 31, 1930. On September 4, 1925, the lessor subleased certain of these lands to the Strawberry Water Users Association as part of an adjustment between the rival interests seeking to use the watershed lands. The memorandum noted that the association had taken over control of the project in 1926 and that the water users in 1930 had paid about 33 percent of the construction costs. To that extent, according to the memorandum,

"they have under the act of 1910 obtained what might be designated quasi-equitable title to an interest in the purchased grazing lands"; and because "the United States still holds 67 percent of the equitable ownership of the purchased lands," the Bureau could object and control the association if overgrazing rendered the watershed lands of less value for protection of the reservoir.

Plaintiff association assumed responsibility for care, operation, and maintenance of the project, including the watershed lands, on October 1, 1926, under a contract dated February 28, 1926 (the "1926 contract"). The 1926 contract preserved the special status in the water users' right to revenues from the watershed lands and reflected the confusion that had arisen about the relationship of that status to the future transfer of title.

In 1902, the Reclamation Act provided that management and operation of the irrigation works would pass to the water users when payments had been made for the major portion of the lands irrigated. In 1924, the Fact Finders Act [22] changed this standard. Formation of a legally organized water users association was required, and the association would take over the care, operation, and maintenance of the project works "whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water rights contracts between the water users and the United States." [23] The owners of the lands irrigated from the Strawberry Valley project in 1926 did not meet the criteria of the 1902 act and could not take over project management and operation; they could, however, meet the new standard in the 1924 act.

The 1926 contract transferred to the association the care, operation, and maintenance of the entire Strawberry

[22] The Act of December 5, 1924, 43 Stat. 701 (the "1924 act").

[23] 43 U.S.C. § 500 (1970).

Valley project in Utah and all its works except the Mapleton and Springville lateral and the High Line Canal. Paragraph 5 of the contract's explanatory premises recited that 56,869.51 acres of land had been purchased under the 1910 act, and incorporated by reference an annexed schedule A which particularly delineated the lands and was captioned "Description of Lands Purchased for protection of the watershed of Strawberry Reservoir, under authority of the Act of April 4, 1910 (36 Stat. 285)." Paragraph 5 stated the watershed lands "protect the watershed of the Strawberry Reservoir, is a part of said project, is valuable for grazing purposes, and is hereinafter referred to as watershed land."

Article 22 of the 1926 contract recognized the special status of the watershed lands. Receipts from the lands after October 1, 1926, were directed to be collected by the association and the net receipts to be credited to the association under subsection I of section 4 of the 1924 act. Parenthetical statements, however, permitted the possibility that care, operation and maintenance could be transferred at a time other than October 1, 1926, and that distribution of the net receipts could be credited by court order otherwise than as directed by subsection I of section 4.[24] The provisions of the 1910 act relative to the passage of title, management and control were quoted in article 22, which then concludes with the following statement:

> * * * It is understood that the title, management and control of said purchased land is not to pass to the Association under said Act unless and until at least 51 percent of the project construction cost is paid to the United States, the Secretary's decision as to

[24] Article 20(c) also provided for the contingency that care, operation and maintenance could be turned over at times other than October 1, 1926.

> said date to be final and binding upon both parties hereto.

The association took over the care, operation, and maintenance of the entire Strawberry Valley project on October 1, 1926, and net revenues from the watershed lands that accrued between October 1, 1926, and November 20, 1928, were credited to the association. There is no record of correspondence or discussions that involve questions about the association's relationship to the watershed lands in the period between the 1926 contract and a supplemental contract entered into November 20, 1928 (the "1928 contract"). The explanatory premises in the 1928 contract, however, distinguish watershed lands from other project works, and assert that care, operation, and maintenance of the watershed lands did not pass to the association by the 1926 contract. The premises also assert, in the interest of economical administration of the water users "for whose benefit said lands were purchased," that "management and control (but not title)" should be transferred to the association even though 51 percent of the project construction costs had not been paid. Article 10 of the 1928 contract assured continuation of the credit for revenues from the watershed lands and reemphasized the association's right to manage existing and future contracts that produced such revenues.[25]

[25] Article 10 provided:

"Said contract of September 28, 1926 be and the same is hereby modified to the extent that the care, operation and maintenance, (management and control but not the title) of said 56,869.51 acres of land be and the same is hereby transferred to the Association to be utilized by it for the benefit of the owners of the lands irrigated from said project and may collect and use the receipts from any contracts now existing or which may hereafter be made by the Association provided said receipts shall be distributed as specified in Article 22 of said contract dated September 28, 1926, and provided further, that said transfer shall be subject to the terms of any and all existing contracts concerning or affecting said lands."

After extensive negotiations during most of the 1930's, an amendatory contract was executed on October 9, 1940 (the "1940 contract") that superseded both the 1926 contract and the 1928 contract. During the negotiation period, the primary concern was with an extension of the time for payment of unaccrued balances on various obligations and the question of title does not appear to have been a matter of negotiation or dispute. The transmittal memorandum makes it clear that the Bureau intended the 1940 contract to bring all aspects of the contract relationship in the Strawberry Valley project into one instrument, and that the primary purpose, as seen by the Bureau, was to take advantage of the time extensions authorized by the 1939 amendments to the Reclamation Act.[26]

During the negotiations, the Bureau of Reclamation representatives were insistent that the United States retain title to the watershed lands, which usually came to be called grazing lands.[27] The association during these

[26] The transmittal memorandum, dated August 30, 1940, states in part:

"* * * The primary purpose of the contract is, of course, that of granting extensions of time for repayment as authorized by the Reclamation Project Act of 1939 (53 Stat. 1187); these extensions being confined to various obligations heretofore on a fixed 20 or 30 year basis and a floor being placed, in the case of individual contracts, withholding full extensions where full extensions would result in unjustifiable low annual installments." The August 30, 1940, memorandum was referred to the Solicitor's office and was returned to the Secretary for signature on September 21, 1940.

[27] On April 17, 1935, the Bureau of Reclamation submitted a draft contract which contained the following provision:

"12. No title to any of the property, the care, operation and maintenance (management and control) of which was transferred to the Association pursuant to said Association-Government contract shall pass to the Association, but it is specifically understood and agreed that the United States retains the title to the entire Strawberry Valley Project, including the grazing lands (also referred to as water shed lands in said Association-Government contract) and power system."

negotiations, on the other hand, was concerned that the right to income from the watershed lands would be retained and credited to the association's obligations. If the association were to receive title to the watershed lands, however, such receipt would have the unwanted result that the association would be subject to liability for Wasatch County taxes.

In the 1940 contract, the watershed lands were identified as those specified in the 1910 act and were redesignated as grazing lands. The parties agreed, notwithstanding the 1910 act, that the United States would retain title until otherwise provided by Congress, while management and control were continued in the status that had been established in the 1926 contract.[28] Other provisions in article 23 of the 1940 contract retained title, until otherwise provided by Congress, to all the works and property which were transferred to the association for its care, operation and maintenance by the 1926 and 1928 contracts as well as "such property as has been added to the project works, including additions to the power system, by the Association. * * *."

As of January 1, 1940, the United States had invested $90,069.50 in the power system on the project and plaintiff association had invested $90,218.68. The parties agreed that the annual net profits of the power system were to be apportioned on the basis of the respective investments. The association continued to operate and maintain the power system, subject to the reservation

[28] Article 20 of the 1940 contract provided as follows:

"20. Notwithstanding the provisions of the Act of April 4, 1910 (36 Stat. 285), it is agreed that title to the lands described in the attached schedule A (being the same as the lands described in schedule A of the contract of September 28, 1926, and being hereinafter called grazing lands) shall be retained by the United States until otherwise provided by Congress. The management and control of said lands shall remain with the Association, subject to the provisions of Article 34 of this contract."

that the Secretary approve all power contracts and additional capital investments. Net profits from the watershed lands and from the Government's investment in the power system continued to be credited to the water users in conformance with the requirements of subsection I of section 4 of the 1924 act.[29] In the event the United States resumed control of the watershed lands or the power system because of default, however, profits attributable to the association's investment in the power system were to be segregated from subsection I accounts. Profits apportionable to the association's investment in the power system were to be accounted for as directed by plaintiff association, but other profits were to be credited annually to obligations to the United States in a manner consistent with subsection I.

The Solicitor's office of the Department of the Interior frequently has been requested for advice about the legal status of the watershed lands. In addition to the October 18, 1921, opinion, the record contains five memoranda from the office of the Solicitor; all were written after execution of the 1940 contract, two were concerned with the enlargement of the reservoir that is the subject of this case. These memoranda demonstrate the continuing intermixture of concepts related to the right to a current credit for net profits provided by the 1910 act

[29] Subsection I of section 4 of the 1924 act provides:

"That whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid." 43 U.S.C. § 501 (1970).

with concepts that involve a future transfer of title to the watershed lands. In the process of disposing of problems incident to administration of the right to current revenues, however, statements were made about "vested" rights and "equitable title" that were not essential to the problem at hand and which inserted an element of confusion about a transfer to be made in the future. In structure, the memoranda generally traced the legislative and administrative history of the watershed lands, which tended toward a repetition of ideas that had been associated previously with the status of the watershed lands.

Plaintiffs rely upon extracts from memoranda from the Solicitor's office and communications prepared by Bureau of Reclamation officials as a demonstration of a consistent history of administrative interpretation that supports the position for which it contends: that the water users were vested with the full equitable title to the watershed lands, with legal title scheduled to pass, as a matter of course, when 51 percent of the construction costs were repaid. Plaintiffs read too much into these communications. The record of consistent interpretation over successive years cited by plaintiffs is a manifestation of the tendency of an idea, once introduced, to become ingrained and to perpetuate itself in communications in a bureaucracy.

In 1950, advice was sought from Interior's Solicitor on the validity of five oil and gas leases, three of which were entirely on the watershed lands and two of which were partially on the watershed lands. The leases had been made by the Department of the Interior and subsequently ratified by plaintiff association on condition that the rentals and royalties from the leases be credited to the association. Advice also was sought on whether the proceeds from the leases should be distributed as provided either by the Mineral Leasing Act or by subsection I of the Fact Finders Act.

In a memorandum dated December 7, 1950, the Solicitor advised that the Secretary had no authority under either the Mineral Leasing Act of 1920 or the Mineral Leasing Act for Acquired Lands of 1947 to execute oil and gas leases on the watershed lands. Pursuant to the 1940 contract, the watershed lands were under the management and control of the association, and such power clearly included the authority to issue oil and gas leases. The watershed lands were found to be subject to leasing by the association, and proceeds from the leases were to be applied in conformity with the 1910 act and subsection I of section 4 of the Fact Finders Act. In the course of a discussion of the legislative history of the 1910 act, the opinion observed:

> * * * These provisions strongly suggest, if they do not require, the interpretation that Congress intended by the 1910 act to sell the watershed lands to the landowners in the Strawberry Valley project, and to transfer the equitable title to the landowners pending the transfer of legal title. Otherwise, there would be no reason to credit the landowners with the receipts derived from the watershed lands.

The opinion concluded that "although the legal title to the watershed lands is still in the United States, the beneficial interest in these lands is vested in the owners of the lands irrigated from the Strawberry Valley project."

In 1951, the Solicitor supplemented the opinion that the Department of the Interior was without authority because of the 1940 contract to lease any of the watershed lands. The problem at that time involved administration of the two leases that covered both portions of the watershed lands and the 3,200 acres of land adjacent to the reservoir which were non-watershed lands. The November 1, 1951, opinion noted, although the leases in question made by the Department were ineffective insofar as they

embraced the watershed lands, there was no question of their validity because they had been ratified and approved by the association pursuant to the management and control vested by the 1940 contract. The opinion recommended that the leases be modified to segregate leases on watershed lands from leases on lands properly within the Department's authority.

In 1967, the Regional Solicitor, Salt Lake City, reviewed the status of the title to the watershed lands and on July 25, 1967, advised the Regional Director of the Bureau of Reclamation that the United States had retained title to the watershed lands in the 1926 and 1928 contracts, and that its interest in the lands would continue after the original cost had been repaid. The memorandum concludes:

> Based upon the foregoing it is our opinion that the United States retains the legal title to the 56,868.51 acres of land withdrawn in 1907 and 1909 and described in Schedule A of the 1940 contract and the Strawberry Water Users Association owns the beneficial interest therefrom.

On November 14, 1968, the Assistant Solicitor, Reclamation and Power, rendered an opinion to the Regional Solicitor, Salt Lake City, on ownership of lands adjacent to the Strawberry reservoir. In this memorandum, the Solicitor's office advised that the 1910 act was within the scope of the "otherwise provided by Congress" provision of the 1902 act, and that Congress in the 1910 act did authorize transfer of the title to the water users association. In the 1940 contract, however, the memorandum states the water users association had waived its right to have title to the watershed lands so transferred. This opinion was based upon the record of negotiations for the 1940 contract, and the desire of the association for title to remain in the Government for tax reasons. The

Solicitor's office advised that legal title to the watershed lands remains in the United States; that the association would have a right of set-off against project construction costs in an amount equal to lost net revenues from the watershed lands; and that the association would have no perpetual right to income or credit for watershed land revenues after payout of the construction costs. At that time, 1973 was the estimated year for payout.

When the 1940 contract was executed on October 9, 1940, plaintiff association and the water users had not made payments for the major portion of the construction costs of the project which would comply with the requirements of the 1910 act. Exactly when 51 percent of the construction costs was repaid is not clear in the record. The parties are in agreement that on November 30, 1974, the plaintiff association, on behalf of the water users, paid to the United States the final installment due on the $3,499,734.22 construction cost charged to the project and that the construction cost included the sum of $71,085.65, the amount assessed under the provisions of the 1910 act to be paid from the reclamation fund to extinguish Indian title to the watershed lands.

APPENDIX B

Section 6 of the Reclamation Act of June 17, 1902, 32 Stat. 388, 389, 43 U.S.C. § 498

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

APPENDIX C

Act of April 4, 1910, 36 Stat. 269, 285

That the Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of one dollar and twenty-five cents per acre for the lands in the former Uintah Indian Reservation, in the State of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, chapter fourteen hundred and seventy-nine, and which were by the Secretary of the Interior withdrawn for irrigation works under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project. Such payment shall be made in five annual installments, and the moneys paid shall be subject to the same disposition as the proceeds of the sales of lands in the former Indian reservation. All such payments shall be included in the cost of construction of said Strawberry Valley project to be reimbursed by the owners of lands irrigated therefrom, all receipts from said lands, as rentals or otherwise, being credited to the said owners. All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act.

APPENDIX D

Subsections G and I of Section 4 of the Fact Finder's Act of December 5, 1924, 43 Stat. 701, 702-703

SUBSEC. G. That whenever two-thirds of the irrigable area of any project, or division of a project, shall be covered by water right contracts between the water users and the United States, said project shall be required, as a condition precedent to receiving the benefits of this section to take over, through a legally organized water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water users' association or irrigation district, and when the water users assume control of a project, the operation and maintenance charges for the year then current shall be covered into the construction account to be repaid as part of the construction repayments. (43 U.S.C. § 500.)

SUBSEC. I. That whenever the water users take over the care, operation, and maintenance of a project, or a division of a project, the total accumulated net profits, as determined by the Secretary, derived from the operation of project power plants, leasing of project grazing and farm lands, and the sale or use of town sites shall be credited to the construction charge of the project, or a division thereof, and thereafter the net profits from such sources may be used by the water users to be credited annually, first, on account of project construction charge, second, on account of project operation and maintenance charge, and third, as the water users may direct. No distribution to individual water users shall be made out of any such profits before all obligations to the Government shall have been fully paid. (43 U.S.C. § 501.)

APPENDIX E

GEORGE SUTHERLAND, Utah, Chairman
D. C. CLAYTON, Clerk

UNITED STATES SENATE

COMMITTEE ON EXPENDITURES IN THE
DEPARTMENT OF JUSTICE

Washington, D.C.

Dec. 31, 1915

Messrs. Lars Nielsen,
President of the Water Users, Spanish Fork

and J. H. Page, Jr.,
President of the Water Users, Payson, Utah.

My dear Friends:

This morning I received your night letter dated the 30th, with reference to the lease of the lands set aside for the Strawberry project. I immediately saw Assistant Secretary Jones, who has charge of the matter, and laid the facts fully before him. He seems to have made up his mind at present to turn the lease over to the Wasatch people at the same rate named in the Crane bid. His principal reason for this is that the Wasatch people will use the lands for pasturing cattle and horses, and that a large number of the people—several hundred—will be benefited. He said, however, that if he was mistaken about this, and the Wasatch people were to use the land for their sheep, he could not justly reject the Crane bid because the Crane people are also to use the land for their sheep. The amount to be realized is very large, about a third more than has been received in prior years. Of course, this matter is wholly in the hands of

the Department and whatever the Secretary concludes to do will be final.

He showed me your telegram, in which you said that a letter would be mailed on the 31st and promised that he would withhold action until that was received. I am inclined to think, however, that he will finally approve the lease to the Wasatch County people unless he is convinced that they intend to run sheep instead of horses and cattle.

The fear which you express that the lands will be thrown back into the forest reserve, or in any manner taken from the water users, is groundless. It is quite probable that Judge King a year or two ago, acting in behalf of the Wasatch people hoped to bring this about. I saw him in Washington and talked with him at the time. He asked me, substantially, if I would not consent to a modification of the law which grants lands to you. I told him that I would not consent to modifying it in a single particular. I went over the provisions of the law with Assistant-Secretary Jones and he assured me that the Interior Department had not the remotest idea of interfering with the rights which this law grants you and he agreed with me that the law gives you a vested right in these lands. I drew it myself with great care with the intention to accomplish this result. I offered the provision as an amendment to the Indian appropriation bill of 1910. It will be found in Vol. 36, U.S. Statutes at Large, Part I, page 285. After providing that the Secretary of the Interior shall pay for the lands out of the reclamation fund in five annual installments, the law says:

> "All such payments shall be included in the cost of construction of said Strawberry Valley project to be reimbursed by the owners of lands irrigated therefrom, all receipts from said lands, as rentals or otherwise, being credited to the said owners. All right, title, and interest of the Indians in the said

lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act."

So you see the lands are bought and paid for and the Indian title is extinguished. The owners of the water rights reimburse the reclamation fund for these lands the same as they do for the irrigation project, and when the final payment is made by the owners, the title, management and control of these lands passes to the water owners at the same time that the management of the irrigation works passes to them. Under this law there is no doubt that the Interior Department has no power to interfere with the status of the lands and my opinion is that even Congress itself could not deprive you of the rights conferred because those rights have become vested by payment. At any rate, you may be sure that as long as I am in the Senate, I shall not permit your rights to be interfered with without resistance to the full extent of my ability. However, I do not think that any such attempt will be made, and if made, I have no doubt it would be unsuccessful.

If it occurs to you that I can be of further service in this matter, or any other, do not hesitate to notify me.

Very sincerely,

/s/ Geo. Sutherland

(Copies sent to Lars Neilsen, Spanish Fork and J. H. Page, Jr., Payson.)

APPENDIX F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
STRAWBERRY VALLEY PROJECT

AMENDATORY CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE STRAWBERRY WATER USERS' ASSOCIATION

THIS AMENDATORY CONTRACT, Made this 9th day of October, 1940, under the provisions of the Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, and particularly the Reclamation Project Act of 1939 (53 Stat., 1187), together hereinafter referred to as the Reclamation Law, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting for this purpose through E. K. Burlew, First Assistant Secretary of the Interior, hereinafter referred to as the Secretary, and the STRAWBERRY WATER USERS' ASSOCIATION, a corporation organized and existing under the laws of the State of Utah, and having its principal place of business at Payson, Utah, hereinafter referred to as the Association; WITNESSETH:

2. WHEREAS, under the authority of the Reclamation Law, the United States constructed that certain irrigation project in the State of Utah commonly known as the Strawberry Valley Project, sometimes referred to as the Strawberry Valley Reclamation Project, hereinafter called the project; and

3. WHEREAS, the United States and the Association entered into a contract dated September 28, 1926, as supplemented by a contract dated November 20, 1928, hereinafter collectively referred to as the Association-Government contract; and

4. WHEREAS, the Association-Government contract provides, among other things, for the payment by the Association of the expenditures made by the United States in the construction of the project; and

5. WHEREAS, the Association, as the duly authorized representative of the water users involved, desires to enter into an amendatory contract to effect changes in the Association-Government contract under the provisions of the Reclamation Project Act of 1939, and to effect certain other changes in and restate the provisions of the Association-Government contract; and

6. WHEREAS, the Secretary has determined that, in his judgment, such amendatory contract is both practicable and in keeping with the general purpose of the Reclamation Project Act of 1939:

7. NOW, THEREFORE, in consideration of the premises and covenants herein contained, the following mutual covenants are agreed on between the parties hereto:

SCOPE OF AMENDATORY CONTRACT

8. It is hereby agreed that this amendatory contract supersedes and takes the place of the contracts between the United States and the Association dated September 28, 1926, and November 20, 1928, (above defined as the Association-Government contract), and that said Association-Government contract shall remain or be effective only to the extent expressly provided in this contract: *Provided*, That obligations involving payments to the United States under said Association-Government contract which become due and payable prior to November 30, 1940, shall remain unaffected hereby.

DEFINITION OF BALANCES AFFECTED

9. The term "unaccrued balance" as hereinafter used in this contract in relation to obligations to the United States for any part of the cost of the project under any class or group of contracts other than the Association-Government contract or under the Association-Government contract means that portion of the obligation which has not become due and payable prior to November 30, 1940, including installments or parts of installments of such charges with accrued interest thereon deferred under the Act of April 1, 1932 (47 Stat., 75), as amended.

EXTENSION OF REPAYMENT PERIOD OF EXISTING CONTRACTS

10. Subject to acceptance of the terms of this contract as hereinafter provided, the unaccrued balances of various repayment obligations under contracts existing as of November 30, 1940, between the United States and any and all persons and organizations obligated to the United States for the repayment of any part of the cost of construction of the project, are hereby extended for payment as follows:

(a) The unaccrued balance of the Association's obligation under Article 20(c) of the Association-Government contract of September 28, 1926, which is agreed to be $135,609.72, shall be payable in 30 equal annual installments of $4,374.50 payable on December 31 of each year beginning December 31, 1940, and a final installment of $4,374.72 payable December 31, 1970.

(b) The unaccrued balance under the contracts between the United States and the Mapleton Irrigation District, which is agreed to be $124,768.61, shall be paid in 24 equal annual installments of

$4,990.74 on March 1 of each year beginning March 1, 1941; and one installment of $4,990.85 on March 1, 1965.

(c) The unaccrued balance under the contracts between the United States and the Springville Irrigation District, which is agreed to be $100,682.50, shall be paid in 25 equal annual installments of $4,027.30, each installment payable on March 1 of each year beginning March 1, 1941.

(d) The unaccrued balance of construction charges under water right contracts and other contracts between the United States and members of Strawberry Water Users' Association (excepting the contracts covered by sub-sections (b) and (c) above), which provide for repayment of construction charges either in 20 years or 30 years, shall in the case of each such contract be paid either in a number of equal annual installments beginning December 1, 1940, so that the last installment under each individual or other contract shall be payable 40 years (exclusive of 1931 and subsequent years to the extent of moratoria or deferments of construction charges by acts of Congress for such years) from the date the first installment was due under each contract, or in a number of equal annual installments beginning December 1, 1940, which is equal to double the number of unaccrued annual installments remaining on November 30, 1940, whichever number of annual installments will result in the earlier payment of the contract: *Provided*, That, where installments cannot be made exactly equal, the last annual installment may be larger or smaller than the preceding extended installments to the extent necessary to effect complete payment in the extended period; and *Provided Further*, That where a full extension under the foregoing formula would, in the case of a 20-year

contract, result in annual installments of less than 75¢ per acre-foot of water required to be delivered under such contract and, in the case of a 30-year contract, result in annual installments of less than 50¢ per acre-foot of water required to be delivered, the extended annual installments shall be at the rate of 75¢ and 50¢ per acre-foot respectively, with such lesser amount in a final installment as may be required to complete payment under the contract.

(e) The unaccrued balances of construction charges repayable under individual water rights and other repayment contracts providing for repayment to the United States under the provisions of subsection (f) of Section 4 of the Act of December 5, 1924 (43 Stat., 701) and under individual water right contracts between the United States and water users who are not members of the Strawberry Water Users' Association shall continue to be payable in annual installments in accordance with the provisions of these contracts as of the date of this amendatory contract, unless and until such contracts are otherwise extended.

As hereby extended and save for such other express modifications as are made by this amendatory contract, the contracts hereby extended (exclusive of the Association-Government contract) shall remain otherwise unaffected, and the United States shall continue to have all the rights and privileges provided by the existing contracts.

ASSUMPTION OF GENERAL OBLIGATION BY ASSOCIATION

11. The Association hereby assumes the general obligation to pay to the United States the sum of $1,715,458.38, this representing the aggregate unaccrued bal-

ances under all contracts between the United States and any and all persons and organizations (including the obligation of the Association stated in Article 10(a) hereof) obligated to the United States for the repayment of any part of the cost of construction of the project, being the contracts described by Article 10 above.

TIME OF PAYMENT AND AMOUNT OF ANNUAL INSTALLMENTS TO BE PAID BY ASSOCIATION

12. The general obligation of the Association stated in Article 11 shall be paid to the United States by the Association as follows:

(a) That part covered by Article 10(a) shall be paid as therein provided.

(b) That part representing the unaccrued balances of the contracts between the United States and the Mapleton Irrigation District and between the United States and the Springville Irrigation District ($225,-451.11) shall be paid to the United States by the Association in annual installments on March 1 of each year beginning March 1, 1941 continuing until this amount has been paid in full, each annual installment to be equal to the aggregate of the annual installments required to be paid in such year to the United States under the Mapleton Irrigation District and the Springville Irrigation District contracts as extended by Article 10, sub-sections (b) and (c) of this contract.

(c) That part representing the unaccrued balances of the contracts covered by Article 10, sub-section (d) of this contract shall be paid to the United States by the Association in annual installments on December 15 of each year beginning December 15,

1940, each annual installment to be equal to the aggregate of the installments due to the United States in such year under such individual water rights contracts and other contracts.

(d) That part representing the unaccrued balances of the contracts covered by Article 10(e) of this contract shall be paid to the United States by the Association in annual installments on December 15 of each year beginning December 15, 1940, each annual installment to be equal to the aggregate of the installments due to the United States in such year under such individual water right contract and other contracts, including subsequent amendments thereof.

Transfers of water rights under Article 24 of this contract shall not affect or alter the obligations of the Association under this article.

ASSESSMENTS BY ASSOCIATION

13. The Association agrees to make levies and assessments against its members and stockholders sufficient (a) to meet the obligations of the individual water right contracts and other contracts as these are extended by this agreement, (b) to take care of deficiencies caused by defaults of Association members, (c) to meet payments for the Association's obligations under Articles 10(a), and (d) to meet deficiencies in collections on non-member accounts covered by Article 10(e). When the various installments owed by the Association to the United States become due and are paid, such payment shall be regarded as satisfaction of the respective installments due to the United States from individual water right contractors and other contractors whose installments are represented by the particular installment paid by the Association to the United States, except in cases of installments due to the United States from non-members: *Provided*, That

such satisfaction shall not prevent the Association from pursuing whatever remedies are available to it to collect from defaulting contractors amounts owed to the Association, it being understood that these installments owed by the Association to the United States are required to be paid notwithstanding the failure of the individual water right contractor or other contractors to pay the Association. In the case of installments representing the aggregate of installments due from non-members of the Association, the Association shall pay its installments to the United States regardless of the failure of individual non-members to pay the Association, and the payment by the Association to the United States on behalf of non-members who have paid the Association shall be accepted as satisfaction of installments then due from such non-members to the United States: *Provided* That payments by the Association under its obligation to the United States shall not, to the extent that such payment includes an amount to cover installments due from non-members that have failed to pay, relieve the defaulting non-members from their primary obligation to the United States or of their obligation to reimburse the Association for any such installments paid by the Association. If any non-member makes payment directly to the United States, appropriate credits shall be given to the Association on installments later to become due to the United States.

OPERATION AND MAINTENANCE OF THE PROJECT WORKS

14. The care, operation and maintenance of the project and all appurtenances thereunto belonging, except the Mapleton and Springville lateral and the High Line Canal, shall remain with the Association subject to all the provisions of Articles 11, 12, 13, 14, 15, 18, 27 and 28 of the contract of September 28, 1926, these articles

being herein incorporated as sub-sections (a) to (h), inclusive, of this article as follows:

(a) Effective on October 1st, 1926, or as soon thereafter as practicable, provided the Secretary has accepted as sufficient, the evidence presented by the Association, that it has increased its membership to include at least 82 per cent of the water rights in acre-feet sold from the project, there is hereby transferred to the Association under the conditions herein stated, the care, operation and maintenance of the entire Strawberry Valley project in Utah and all appurtenances thereunto belonging except the Mapleton and Springville lateral and the High Line Canal. This transfer is made subject to the terms of all existing contracts. No title to any of the property passes. The property so turned over shall hereinafter be referred to as the transferred property.

(b) The Association hereby accepts the care, operation and maintenance of the transferred property, and at its own cost and without cost to the United States, will care for, operate and maintain the same in full compliance with the reclamation law as it now exists (and as it may hereafter be amended), the regulations of the Secretary now and hereafter made thereunder, and the terms of this contract, in such manner that the transferred property shall remain in as good and efficient condition and of equal capacity for the storage, development, diversion and distribution of irrigation and power water and for the development and distribution of electrical energy as is now the case. The Association shall use all proper methods to secure the economical and beneficial use of irrigation water. It shall hold the United States, its officers and agents harmless as to any and all damage which may accrue either within or with-

out the project, growing out of the care, operation and maintenance of the transferred property.

(c) No substantial change in any of the project works shall be made by the Association without first having obtained the written consent of the Secretary. The Association shall make promptly any and all repairs to project works, which in the opinion of the Secretary, are deemed necessary for the proper care, operation and maintenance of the project. If, at any time, in the opinion of the Secretary, any part of the project works shall from any cause be in a condition unfit for service, he may order the water turned out or shut off until, in his opinion, such works are put in proper condition for service. In case of neglect or failure of the Association to make such repairs the United States may, at the option of the Secretary, take back the care, operation and maintenance of the project works, or may cause the repairs to be made and charge the cost thereof to the Association, which the latter agrees to pay. The title to all alterations, repairs and improvements in the project works shall be in the United States.

(d) The Association shall make proper distribution and delivery of water to all parties entitled thereto in full accordance with the provisions of their contracts now and hereafter made and the reclamation law and the public notices and rules and regulations issued by the Secretary thereunder.

(e) The Association shall at all times protect the ownership of the United States as heretofore or hereafter claimed in all seepage, waste and return flow waters under the project, and shall use proper physical and legal measures to retain such waters for project use.

(f) The Association shall perform and carry out in accordance with their true intent and meaning and to the satisfaction of the Secretary, all obligations imposed upon the United States in all project contracts of whatsoever kind or nature, now or hereafter in force, and shall not attempt in any manner to change any of the terms of any of said contracts without the consent of the Secretary. No contract, affecting the project made by the Association except for the usual labor, equipment, supplies and services in connection with the operation and maintenance of the project works, shall be valid until approved by the Secretary, and a draft of each such contract shall be submitted to the Secretary for approval as to form before execution. So far as permitted by law and not otherwise herein provided, the Association shall have all the rights and privileges, under any and all such contracts, that the United States now has or would have if this contract were not in effect.

(g) In order that the United States may withdraw as completely as possible from the care, operation and maintenance of the transferred property, the Association shall:

(1) Install and maintain a modern set of books of account, to be acceptable to the Secretary, showing all financial transactions of the Association, and furnish such financial reports and statements as may be required from time to time by the Secretary.

(2) Accept from the United States the books of repayment accounts and maintain same in accordance with existing contracts with individuals or organizations or as such contracts may hereafter be modified. It is understood that the United States will withdraw completely

from the work of keeping repayment accounts with individuals or organizations.

(3) Keep a reasonably accurate record of all crops raised and agricultural or livestock products produced on the project and furnish to the Secretary on or before December 31 of each year a crop report including the aforesaid data in form prescribed by the Secretary.

(4) Keep for each year a careful and accurate record of the project water supply and the disposition of the same, and furnish such detailed reports concerning the same as may be required by the Secretary.

(5) Keep and report such other records as the Secretary may require in the manner and form prescribed by him.

(h) The Secretary shall cause to be made from time to time a reasonable inspection of the project to ascertain whether the terms of this contract are being faithfully executed by the Association. Such inspection shall include examinations of the project, of the transferred property, and of the books, records and papers of the Association relating hereto, together with examinations in the offices of the Bureau of Reclamation of all contracts, papers, plans, records and programs connected with the project. The actual expense of such inspection, as found by the Secretary, shall be paid by the Association to the United States as hereinafter provided.

OPERATION AND MAINTENANCE CHARGES TO BE PAYABLE IN ADVANCE

15. In its operation and maintenance of the project, the Association shall collect each year in advance from the water users the estimated net cost of operation and

maintenance of the project for that year. The net estimated cost of operation and maintenance, including an amount sufficient to cover the entire annual project operation and maintenance allowing for deficiencies in collections and other contingencies, shall be distributed equitably against each acre-foot of water to be delivered under the various contracts or water right applications from the project supply, whether members or non-members: *Provided*, That this provision shall not preclude the levy of minimum operation and maintenance charges by the Association in its discretion. Payment of assessments or tolls fixed to meet the estimated net operation and maintenance cost shall be required to be made in advance of the delivery of water under any such contract or water right application.

REFUSAL TO DELIVER IN CASES OF DEFAULT

16. The Association agrees that it will refuse to deliver water from the project supply to lands or parties which fail to make these payments to the United States, the Association or any other organization in which the lands or parties are included: (a) advance payments of operation and maintenance or toll charges, or (b) payments of construction charges or other fixed charges due from such lands or parties within twelve months of their due date; and no such water shall be delivered to the Association or to lands or parties within its organization and the Association is hereby forbidden to deliver or permit the delivery of such water to lands or parties within its organization when the Association is in arrears in the advance payment of operation and maintenance charges, if any, due the United States, or the payment on the due date of obligations under Article 19 hereof, or is more than twelve months in arrears in the payment of any construction charges due the United States hereunder. The provisions of this article are not

exclusive and shall not in any manner hinder the United States from exercising any other remedy to enforce collection of any amounts due to it under this contract.

COMPETENT SUPERINTENDENCE REQUIRED

17. Until payment to the United States of the obligation herein assumed has been completed as herein provided, the Association agrees to employ as project manager or superintendent a competent person who need not be an irrigation engineer; a competent civil or irrigation engineer; a competent power superintendent who shall have had experience in charge of the operation of a hydroelectric power system of similar character and magnitude to that on the project, and a competent accountant. The selection of each of said persons shall be subject to the approval of the Secretary, and upon notice from the Secretary that any of said employees is or has become unsatisfactory, the Association shall promptly, as often as such notice is given, terminate the employment of such unsatisfactory employee and promptly employ one acceptable to the Secretary. Subject to the approval of the Secretary, one person may be employed to fill any two of the aforesaid positions.

DISPOSAL OF ADDITIONAL RIGHTS IN THE PROJECT WATER SUPPLY

18. The Association shall have the right, subject to approval by the Secretary, to contract for the sale, lease or rental of water from the project supply for the purpose of raising funds to meet the obligation represented by the unaccrued balance defined in Article 10(a): *Provided*, That such disposal of such rights shall not affect the primary obligation of the Association under this contract, nor the manner of payment to the United States by the Association provided in Article 12.

PAYMENT AND OVERHEAD COSTS AND OTHER DIRECT COSTS

19. On March 1 of each year from the effective date of this amendatory contract, until the Association obligation hereunder is paid in full, the Association shall pay to the United States, in each case, for the preceding calendar year ending on December 31, the following overhead and other direct costs:

(a) A charge to cover that part of the expense incurred by the United States in the operation of Reclamation's Chief Engineer's office, field legal office, and other detached offices, which in the opinion of the Secretary are properly and equitably chargeable to this project.

(b) The cost of repairs to project works made under Article 13 of the contract of September 28, 1926, as incorporated in this contract by Article 14.

(c) The cost of inspections made under Article 28 of the contract of September 28, 1926, as incorporated in this contract by Article 14.

(d) The direct cost, plus such proportionate part of overhead cost as may be apportioned thereto, of hydrometric measurements made by the United States for the proper division of project water and for the proper protection of project water rights.

(e) Such other direct costs for special work or services performed for the benefit of the project by the United States at the direction of the Secretary, and which in the opinion of the Secretary, are for the use and benefit of the project.

For the first calendar year in which this amendatory contract is effective, determinations of costs hereunder shall be for the entire calendar year, except as to such

items of cost that have accrued and for which the Association has made other arrangements for payment or satisfaction.

GRAZING LANDS

20. Notwithstanding the provisions of the Act of April 4, 1910 (36 Stat., 285), it is agreed that title to the lands described in the attached schedule A (being the same as the lands described in schedule A of the contract of September 28, 1926, and being hereinafter called grazing lands) shall be retained by the United States until otherwise provided by Congress. The management and control of said lands shall remain with the Association, subject to the provisions of Article 34 of this contract.

POWER SYSTEM

21. It is understood and agreed that the United States had invested in the power system on the project as of January 1, 1940, the sum of $90,069.50, and that the Association, as of that date, had invested in said power system the sum of $90,218.68; and that the annual net profits of the said power system shall be apportioned on the basis of the relative investment of the United States and the Association. Subject to the provisions of Article 34 hereof, the Association shall continue to operate and maintain said power system: *Provided*, That all contracts for the sale or lease of power or power privileges shall be upon terms and conditions and at rates approved by the Secretary.

It is understood and agreed that no additional capital investment in said power system shall be made by the Association unless and until approved by the Secretary.

ACCOUNTING FOR AND APPLICATION OF NET PROFITS FROM GRAZING LANDS AND POWER SYSTEM

22. Annual credits to project water users for all or any part of the profits realized from the grazing lands and the Government's investment in the power system shall be pro rated equally to each acre-foot of the water that has been sold from the project water supply: *Provided*, That, as to water sold from the water supply of the project during the year for which credit is being given, credit shall be given only for that part of the year from the date of the sale of such water. Credits so given to project water users shall conform to the requirements of Sub-section I of Section 4 of the Act of December 5, 1924 (43 Stat., 701).

Within thirty days after the end of each calendar year, the Association shall submit to the United States detailed statements concerning the operation of and profits from the grazing lands and power system for the preceding calendar year.

In the event the United States resumes control of the grazing lands or power system or both as permitted under Article 34, profits apportionable to the Association's investment in the power system shall be accounted for as directed by the Association, but other profits, as determined by the Secretary after the end of each calendar year, shall be credited annually to the project water users and to the Association's obligations to the United States in the manner to be determined by the Secretary, but not inconsistent with the provisions of Sub-section I of the Act of December 5, 1924.

TITLE TO PROJECT WORKS

23. Title to all the works and property which were transferred to the Association for its care, operation and maintenance by the Association-Government contract and

such property as has been added to the project works, including additions to the power system, by the Association shall be in and remain in the name of the United States until otherwise provided by Congress.

TRANSFER OF WATER RIGHTS

24. The Association is hereby granted the right to transfer water rights, with the written consent of the canal companies affected, from marginal lands to better lands, or to the project water supply, to be available until sold, for the project generally; but no such transfer, either to better lands, or to the project water supply, shall alter the annual payments due the United States under the terms of this contract; and no such transfer shall alter the various installments provided for in Article 12 hereof. No such transfer shall be effective until the contract providing for the same shall have been approved in advance by the Secretary. The procedure to be followed in making any such transfer, and the terms and conditions of such transfer, shall be satisfactory to the Secretary, and upon the transfer of any water right under the terms of this contract the Association shall promptly forward to the Bureau of Reclamation, Washington, D.C., a certified copy of such recorded contract.

ASSOCIATION TO USE ALL POWERS TO COLLECT CHARGES

25. The Association agrees that it will cause to be made and collected all necessary assessments and will use all the powers and resources of the Association, including the power of the Association to levy and collect assessments against its shares of stock and the power to withhold delivery of water, to collect from the project water users and pay to the United States all charges or sums provided in this contract in full on or before the day that such charges become due. The debts due the

United States hereunder are prior to all other obligations of the Association, and from any moneys coming into the possession of the Association and applicable to the payment of its obligations, the United States shall be paid prior to all other claimants, whether the directors of the Association, its officers and employees, or other claimants.

SEPARATE ACCOUNTS TO BE KEPT

26. The Association agrees that it will keep separate accounts showing collections made which are to be applied to the payment of installments coming due under the Association's general obligation to the United States, net receipts from grazing lands and the Government's portion of the net profits from the power system.

PENALTY FOR DELINQUENCY IN PAYMENT

27. In the event that any payment to the Association or to the United States under any contract having a repayment period extended by the operation of this contract, or any payment by the Association to the United States provided for in this contract is not made on or before the date that such payment is due and payable, there shall be added to the amount unpaid a penalty of one-half of one per cent on the day following the due date, and there shall be added a like penalty of one-half of one per cent of said unpaid amount on the first day of each calendar month thereafter so long as such default shall continue.

UNITED STATES MAY ASSIST IN COLLECTION

28. The United States reserves the right to pursue whatever remedies are available to it for the collection of amounts owed by individuals or organizations under any contracts or water right applications to the United States, and may pursue such remedies in aid of collections by the Association, but such action shall in nowise alter the primary obligations of the Association hereunder to the United States.

ASSOCIATION NOT TO ACT AS FISCAL AGENT. GUARANTEE FUND AND BOND DISPENSED WITH

29. The guaranty fund and guarantee bond provided for in Articles 29 and 30 of the Association-Government contract of September 28, 1926 will not be required to be continued under this amendatory contract. The revocation of the designation of the Association as fiscal agent shall be effective when the Secretary notifies the Association that satisfactory confirmation proceedings, as provided in Article 32, have been completed; and the Association, on receiving such notice, is hereby authorized to cancel its guaranty bond, saving to the United States under such bond any rights that have accrued prior to the date of this contract. The instrument by which cancellation is effected shall be in form satisfactory to the Secretary. The United States agrees to return to the Association within a reasonable time from the date of such notice securities now on deposit pursuant to Article 29 of said contract of September 28, 1926.

ACCESS TO BOOKS AND RECORDS

30. The proper officer or agent of the Association shall have full and free access at all reasonable times to the project books and official records of the United States relating to the construction, acquisition, care, operation and maintenance of the project, with the right at any time during office hours to make copies of and from the same, or any of them, and the proper representatives of the United States shall have similar rights in respect to the books and records of the Association relating to the project and its care, operation, maintenance and control.

RULES AND REGULATIONS OF THE UNITED STATES

31. The United States reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations,

and to add to or modify them as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract.

CONFIRMATION PROCEEDINGS

32. Upon the execution of this amendatory contract, the Association agrees to bring proceedings promptly under the provisions of Chapter 81 of the Session Laws of Utah, 1933, as amended by Chapter 108 of the Session Laws of Utah, 1935, or other appropriate laws of the State of Utah, approving and confirming this contract and decreeing and adjudging the same to be a lawful, valid, and binding obligation upon the Association; approving and confirming the Articles of Incorporation of the Association as amended to date and decreeing said articles to be lawful and valid; and decreeing and adjudging said Association be a duly organized and existing corporation under and by virtue of the laws of the State of Utah. All stockholders of the Association; all lienors, mortgagees, owners of land within said Strawberry Valley Reclamation Project; and all parties affected by this amendatory contract shall be made parties to such confirmation proceedings. All defendants not objecting to the confirmation of this contract or defaulting in such confirmation proceedings or accepting the benefits of the longer period of payment shall be conclusively presumed to assent to the provisions of this contract so confirmed and to the provisions thereof modifying any water-right contract held by them with the United States or the Association.

In the event that in the opinion of the Secretary a satisfactory confirmatory decree is not promptly secured as herein provided, the Secretary by giving notice in writing to the Association may terminate this contract. In the event of such termination, the Association-Government contract shall be deemed reinstated and shall be deemed as having been continuously in full force

and effect unmodified by this contract, and any sums due the United States under said reinstated Association-Government contract which have not been paid or have been paid only in part because of the operation of this amendatory contract shall become immediately due and payable.

ASSIGNMENT PROHIBITED

33. No assignment or transfer of this contract or any part thereof or interest therein shall be valid until approved by the Secretary. All rights of action for breach of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

RESUMPTION OF MANAGEMENT AND CONTROL IN EVENT OF DEFAULTS

34. (a) In the event the Association at any time or times is in default in its obligations to the United States under this contract or is found by the Secretary to be operating the project or any part thereof in violation of the provisions of this contract, the United States may, at the election of the Secretary, take back and operate and maintain all or any part of the property and works, title to which is vested in the United States on giving written notice to the Association of the election, of the property and works to be taken back, and of the effective date of the election. Notwithstanding any such resumption of operation and maintenance by the United States, all or any part of the property or works taken back by the United States may, at the election of the Secretary, be re-transferred to the Association for operation and maintenance in accordance with the terms of this contract on the Association's being given a written notice of such election, of the property or works to be re-transferred, and of the effective date of the retransfer. The Association hereby agrees to surrender possession of any such works or property or to accept the retransfer on the

effective date of such surrender or retransfer specified in any such written notice. No resumption of works or property herein provided for shall relieve the Association of its obligations under this contract.

(b) During any period that works or property are being operated and maintained by the United States, as permitted under this Article, the Association agrees that it will pay in advance operation and maintenance costs of the works being, or to be, operated by the United States. Payments shall be made on the basis of estimates made by the Secretary and at such times as the Secretary shall direct. If funds advanced by the Association under any such estimate exceed the actual costs for the period covered by such estimate, the excess shall be credited to the Association on subsequent amounts to come due under this Article or in such other manner as the Secretary may direct.

SECRETARY ARBITER OF DISPUTES INVOLVING QUESTIONS OF FACT

35. In the event of disputes between the parties hereto arising out of this contract involving questions of fact, and in so far as the provisions hereof require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions and as the one required to make such determination of facts; and his decision thereon shall be conclusive and binding on the parties hereto.

CONTRACT CONTINGENT UPON APPROPRIATIONS

36. Where the operations of this contract extend beyond the current fiscal year the contract is made contingent upon Congress making the necessary appropriation for expenditures thereunder after such current year shall have expired. In case such appropriation as may be necessary to carry out this contract is not made, the contractor hereby releases the United States from all

liability due to the failure of Congress to make such appropriation.

OFFICIALS NOT TO BENEFIT

37. No Member of, or Delegate to Congress, or Resident commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom, but this restriction shall not be construed to extend to this contract, if made with a corporation or company for its general benefit.

SUCCESSORS AND ASSIGNS OBLIGATED

38. The provisions of this agreement shall apply to and bind the successors and assigns of the respective parties.

IN WITNESS WHEREOF, the parties hereto have signed their names the day and year first above written.

THE UNITED STATES OF AMERICA

By /s/ [Illegible]
First Assistant Secretary
of the Interior

STRAWBERRY WATER USERS' ASSOCIATION

By /s/ [Illegible]
President

[SEAL]

ATTEST:

/s/ E. G. Breeze
Secretary

SCHEDULE A

Description of Lands Purchased for Protection of the Watershed of Strawberry Reservoir, under authority of the Act of April 4, 1910 (36 Stat., 285).

Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35, and 36, Township 2 South, Range 12 West, Uintah Special Base & Meridian;

Sections 1, 2 and 12, Township 3 South, Range 12 West, Uintah Special Base & Meridian;

Sections 18, 19, 29, 30, 31 and 32, Township 2 South, Range 11 West, Uintah Special Base & Meridian;

Sections 1 to 36, inclusive, Township 3 South, Range 11 West, Uintah Special Base & Meridian;

Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 29, 30, 31 and 32, Township 4 South, Range 11 West, Uintah Special Base & Meridian; containing 56,668.51 acres, more or less, in the vicinity of the Strawberry Reservoir, Wasatch County, Utah.

RESOLUTION

BE IT AND IT IS HEREBY RESOLVED by the Board of Directors of the Strawberry Water Users' Association that the President and Secretary of said Association be, and they hereby are, authorized and empowered to execute and deliver, for and on behalf of said Association, an amendatory contract with The United States of America to effect changes in the contract between the Association and the United States, dated September 28, 1926, as supplemented by a contract dated November 20, 1928, under the provisions of the Reclamation Project Act of 1939, in regard to the repayment by the Association of the cost of the Strawberry Valley Project, and to effect certain other changes in and restate the provisions

of said contracts, upon the terms and conditions set out in the form of contract submitted to and considered at this meeting or upon such other terms and conditions as may be satisfactory to said officers of this Association.

CERTIFICATE

I, E. G. Breeze, Secretary of the Strawberry Water Users' Association, do hereby certify that the foregoing is a full, true and correct copy of a resolution passed by the Board of Directors of said Association at a regular meeting duly called and held on the 9th day of October, 1940;

I further certify that at said regular meeting fifteen Directors were present and that fifteen Directors voted in favor of said resolution, and that no Directors voted against said resolution;

I further certify that the total number of Directors of said Strawberry Water Users' Association is sixteen;

I further certify that the form of contract considered at the said meeting of the Board of Directors on the 9th day of October, 1940, is the same as the form of contract executed on the 9th day of October, 1940, by William Grotegut, President, and E. G. Breeze, Secretary of the Strawberry Water Users' Association.

Dated this 10th day of October, 1940.

/s/ E. G. Breeze
Secretary

[SEAL]

APPENDIX G

UNITED STATES DEPARTMENT
OF THE INTERIOR

Office of the Solicitor
Washington 25, D. C.

M-36051 December 7, 1950

Memorandum

To: The Director, Bureau of Land Management

From: The Solicitor

Subject: Oil and gas leases on land in the Strawberry Valley reclamation project

This responds to your request for my opinion on two questions concerning five noncompetitive oil and gas leases [1] issued by the Department pursuant to section 17 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 1946 ed., sec. 226), on certain land in the Strawberry Valley reclamation project.

The land included in the five leases is situated in the Uintah Valley, Utah, which was set apart in 1861 as a permanent reservation for Indians.[2] By the act of May 27, 1902 (32 Stat. 245, 263), the Secretary of the Interior was directed to allot land in the reservation to the Indians prior to October 1, 1903, "on which date all the unallotted lands within said reservation shall be restored to the public domain." By subsequent acts,[3] the time for

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[1] Salt Lake City 068640-068644, inclusive.

[2] Presidential Proclamation of October 3, 1861 (1 Kappler 900); act of May 5, 1864 (13 Stat. 63).

[3] Act of March 3, 1903 (32 Stat. 982, 998); act of April 21, 1904 (33 Stat. 189, 207).

opening the unallotted lands to public entry was extended from October 1, 1903, to March 10, 1905. Finally, by the act of March 3, 1905 (33 Stat. 1048, 1069), it was provided that the time for opening the unallotted lands to public entry would be extended to September 1, 1905, unless the President should determine that the lands could be opened to entry at an earlier date. The 1905 act also provided that the unallotted lands should be opened to entry by proclamation of the President, and "That before the opening of the Uintah Indian Reservation the President * * * may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development * * *" (33 Stat. 1070).

In accordance with the 1905 act, the President issued a proclamation on July 14, 1905 (34 Stat. 3119), opening to entry on August 28, 1905, all unallotted lands in the reservation, except such land as might be reserved for other purposes by that date. On August 3, 1905, the President issued a second proclamation (34 Stat. 3141), which withdrew certain land in the reservation "for reservoir site necessary to conserve the water supply for the Indians." This proclamation was modified on August 14, 1905, by a third proclamation (34 Stat. 3143), which reduced the area of land previously withdrawn to a total of 60,068.51 acres. The withdrawn land included all the land which is embraced in the five oil and gas leases now under consideration.

Subsequently, on May 13, 1907, and November 12, 1909, a total of 56,868.51 acres of withdrawn land were included in two first-form reclamation withdrawals made by the Secretary of the Interior pursuant to section 3 of the Reclamation Act of June 17, 1902 (43 U.S.C., 1946 ed., sec. 416), for the benefit of the Strawberry Valley project. These withdrawals included all the land contained in three of the five leases presently under consideration, and part of the land included in the other two leases. The remainder of the leased land with which we are concerned is comprised within the 3,200 acres which were withdrawn by the President's proclamation of August 3, 1905, as modified by the proclamation of August 14, 1905, but which were not affected by the reclamation withdrawal orders of 1907 and 1909.

Following the two reclamation withdrawals, Congress passed the act of April 4, 1910, which provided in part as follows:

> "That the Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of one dollar and twenty-five cents per acre for the lands in the former Uintah Indian Reservation, in the State of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, chapter fourteen hundred and seventy-nine, and which were by the Secretary of the Interior withdrawn for irrigation works under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project. * * * All such payments shall be included in the cost of construction of said Strawberry Valley project to be reimbursed by the owners of lands irrigated therefrom, all receipts from said lands, as rentals or otherwise, being credited to the said owners. All right, title, and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass

under the terms of the Reclamation Act." (36 Stat. 269, 285.)

The last sentence in this quoted portion of the 1910 act apparently referred to section 6 of the Reclamation Act (43 U.S.C., 1946 ed., secs. 491, 498), which reads as follows:

> "That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form or organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

A short time later, on October 20, 1910, the Secretary of the Interior withdrew for the use of the Strawberry Valley project the remaining 3,200 acres of land which had been reserved by the President in the proclamations of August 3 and 14, 1905. Thus, all the land withdrawn by the President was subsequently included by the Secretary of the Interior in reclamation withdrawals made for the benefit of the Strawberry Valley project, and all the land in the five oil and gas leases with which we are concerned is included in the overlapping withdrawals. However, only the land included in the reclamation withdrawals of 1907 and 1909 (i.e., 56,868.51 acres) was affected by the act of April 4, 1910.

Thereafter, Congress passed the act of December 5, 1924, section 4 of which is known as the Fact Finders' Act (43 Stat. 701). Subsection G of section 4 (43 U.S.C., 1946 ed., sec. 500) provides that whenever two-thirds of the irrigable area of a reclamation project shall be covered by water-right contracts between the water users and the United States, the project shall be required, as a condition precedent to receiving the benefits of the act, "to take over, through a legally organized water users' association or irrigation district, the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe * * *." Subsection I of section 4 (43 U.S.C., 1946 ed., sec. 501) provides that whenever the water users take over the care, operation, and maintenance of a project, the net profits derived from the operation of project power plants, "leasing of project grazing and farm lands", and the sale or use of townsites shall be credited to construction charges, operation and maintenance charges, etc.

On September 28, 1926, the Secretary of the Interior entered into a contract (Ilr-78) with the Strawberry Water Users' Association for the purpose of enabling the project to obtain the benefits of the Fact Finders' Act. Article 11 of the contract transferred to the Association "the care, operation and maintenance of the entire Strawberry Valley project", except for a lateral and a canal which had already been turned over to certain irrigation districts and a canal company, but the article provided that no title to any of the property belonging to the project passed to the Association. Article 5 of the contract recited that under the act of April 4, 1910, "there was acquired by purchase" for the project 56,868.51 acres of grazing land protecting the water-shed of the Strawberry reservoir. Article 22 provided that the receipts from the land, designated in the contract as the "watershed lands",

should be disposed of in the manner provided by subsection I of the Fact Finders' Act. Article 22 also specifically provided "that the title, management and control" of the watershed lands should not pass to the Association under the 1910 act until 51 percent of the project construction cost was paid to the United States. The watershed lands were described in Schedule A of the contract. They included all the land covered by the five oil and gas leases under consideration here, except the 3,200 acres which were not withdrawn for reclamation purposes until October 20, 1910, after the passage of the 1910 act.

On November 20, 1928, the 1926 contract was amended "to the extent that the care, operation and maintenance (management and control but not the title) of said 56,869.51 acres of land be and the same is hereby transferred to the association to be utilized by it for the benefit of the owners of the lands irrigated from said project * * *" (Art. 10).

The 1926 contract, as amended, was superseded by a contract dated October 9, 1940. The 1940 contract continued the provisions of the 1926 contract which transferred the care, operation, and maintenance of the Strawberry Valley project to the Strawberry Water Users' Association. With respect to the watershed lands, Article 20 of the 1940 contract provides:

> "Notwithstanding the provisions of the Act of April 4, 1910 (36 Stat., 228), it is agreed that title to the lands described in the attached schedule A (being the same as the lands described in schedule A of the contract of September 28, 1926, and being hereinafter called grazing lands) shall be retained by the United States until otherwise provided by Congress. The management and control of said lands shall remain with the Association * * *."

Article 22 of the 1940 contract provides for the crediting of profits realized from the "grazing lands" (watershed lands) in conformity with subsection I of the Fact Finders' Act.

I

Your first question, in effect, is whether the five oil and gas leases, to the extent that they include watershed lands, should have been issued (1) by the Department pursuant to the Mineral Leasing Act of 1920, *supra*, or (2) by the Department under the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1946 ed., Supp. III, secs. 351-359), or (3) by the Strawberry Water Users' Association.

Although the Uintah Indian reservation had been created out of the public domain, the land comprising it did not occupy the status of public domain land while included within the reservation. This is made clear by the act of May 27, 1902, which provided for the restoration "to the public domain" of such of the reservation land as might not be allotted to the Indians by a certain date. This date was eventually fixed as August 28, 1905, by the President's proclamation of July 14, 1905, but before August 28, 1905, the President withdrew certain land in the reservation, including the watershed lands, for a reservoir site. This withdrawal necessarily had the effect of preventing the withdrawn land from reverting to the public domain on August 28, 1905.

That the land withdrawn by the President retained its status as Indian land after August 23, 1905, seems clearly to be established by the act of April 4, 1910, which provided for the extinguishment of the Indian title to the 56,868.51 acres which had also been withdrawn by the Secretary for reclamation purposes. If the land referred to in the 1910 act had previously been restored to the public domain, there would have been no necessity for Congressional action extinguishing the Indian title to the land.

The question, then, is whether the 1910 act operated to convert the land covered by that act from Indian land to public domain land. It does not appear that the act had that effect. The act provided that the payments to the Indians should be included in the cost of construction of the Strawberry Valley project and should be reimbursed by the owners of lands irrigated from the project; that the title to the land should eventually pass to such owners; and that, in the interim, all rentals and other receipts from the land should be credited to such owners. These provisions strongly suggest, if they do not require, the interpretation that Congress intended by the 1910 act to sell the watershed lands to the landowners in the Strawberry Valley project, and to transfer the equitable title to the landowners pending the transfer of legal title. Otherwise, there would be no reason to credit the landowners with the receipts derived from the watershed lands.

The legislative history of the 1910 act, although meagre, supports this interpretation. The portion of the act involved in this discussion first appeared as a separate bill (S. 5926) in the 61st Congress. That bill, however, did not contain the sentence providing that the payments made to the Indians should be included in the construction costs of the Strawberry Valley project, to be reimbursed by the landowners, and that receipts from the land should be credited to the landowners; and the bill did not include the provision for the transfer to the landowners of title to the watershed lands. In lieu of the transfer of title provision, the bill simply provided that the watershed lands should be available in connection with operations under the Reclamation Act, and that any proceeds from the lands should be covered into the reclamation fund. Even so, in the debate on the bill in the Senate, Senator Sutherland of Utah, who handled the bill on the floor, stated that the money paid for the watershed lands "will be charged against the project and will have

to be paid ultimately by the farmers who receive the water." (45 Cong. Rec. 1822.) Senator Sutherland also asserted at one point that the land covered by the bill was not public land, and at another point he said that it was public land "charged with a trust for the benefit of the Indian." (45 Cong. Rec. 1822.)

When the 1910 act, which was an appropriation measure, was before the Senate, the provisions of S. 5926 were added to the 1910 act by amendment. In conference, the text quoted above was adopted. The specific inclusion of provisions to the effect that the payments to the Indians should be included in the construction cost of the Strawberry Valley project, to be reimbursed by the owners of land irrigated from the project, and that the title to the watershed lands should pass to such landowners whenever the management and operation of the irrigation works should pass to them, and the substitution, for the original provision in S. 5926 to the effect that the receipts from the watershed lands should go into the reclamation fund, of the requirement that the receipts should be credited to the landowners, seem to demonstrate unequivocally that it was the intent of Congress to provide in the 1910 act for an immediate transfer of the beneficial interest in the watershed lands to the landowners in the Strawberry Valley project, and for the ultimate transfer to the landowners of legal title to the watershed lands.

The effect of the 1910 act was discussed at great length in hearings which were held in 1922 on H.R. 10861, 67th Congress, by the House Committee on Public Lands. H.R. 10861 proposed to add all the land covered by the 1910 act to the Uintah National Forest, to be administered by the Secretary of Agriculture. The bill provided that 10 percent of the receipts from the national forest should be paid into the reclamation fund until the fund was reimbursed for the money paid to the Indians

under the 1910 act, and that the Strawberry Valley project should be credited with such payments. The bill also provided for the repeal of the 1910 act to the extent that it was inconsistent with H.R. 10861.

The bill was favorably reported by the House Committee, which expressed the view that the landowners in the Strawberry Valley project had not acquired under the 1910 act such rights in the watershed lands as to prevent the Congress from enacting legislation like H.R. 10861 (H. Rept. No. 1633, 67th Cong.). However, a dissent to the report was filed by a minority of the committee.

The minority view was based upon a report dated September 7, 1922, by the Secretary of the Interior, who recommended against the enactment of H.R. 10861. Referring to the question whether the 1910 act required the transfer to the landowners in the Strawberry Valley project of title to the watershed lands, the Secretary stated that the question was immaterial "because the Act of 1910, in connection with the Reclamation law in general, must be construed as transferring to the landowners a valuable right for which they have assumed an obligation to make full payment and have up to date made payment substantially in accordance with the contract obligations assumed and have in fact made payment of a considerable part toward the amount due on account of these lands."

H.R. 10861 was never considered beyond the committee stage. Consequently, the views of the majority of the House Committee on Public Lands cannot be considered as representing a Congressional interpretation of the 1910 act.

For the reasons given in the preceding discussion, I believe that, although the legal title to the watershed lands is still in the United States, the beneficial interest

in these lands is vested in the owners of the lands irrigated from the Strawberry Valley project.

It follows from this view that the watershed lands are not subject to leasing under the Mineral Leasing Act. That act has been construed by the Attorney General to apply only to the public domain or public lands. 34 Op. Atty. Gen. 171 (1924); 40 Op. Atty. Gen. 9 (1941). The terms "public domain" and "public lands" have been used in various senses, but they generally denote land owned by the United States which is subject to disposal under the general public-land laws. See 34 Op. Atty. Gen., supra (at p. 172). It is obvious that the watershed lands do not fall in this category.

It perhaps should be mentioned that the Mineral Leasing Act has been construed to be applicable to lands of the public-domain category which are temporarily unavailable for disposal under the public-land laws because they have been reserved for special purposes. *J. D. Mell et al.*, 50 L. D. 308 (1924); 43 CFR 191.5, 191.6. In those cases, however, the reservations have been created by acts of the President or of the Secretary of the Interior, and the lands may be restored to public entry by the exercise of the same executive authority that was employed in establishing the reservations. This is not true of the land covered by the 1910 act.

Turning now to the Mineral Leasing Act for Acquired Lands, which was enacted on August 7, 1947, it may be noted that this act is broad in scope and applies, with certain exceptions not relevant here, to "all lands heretofore or hereafter acquired by the United States to which the 'mineral leasing laws' have not been extended * * *" (30 U.S.C., 1946 ed., Supp. III, sec. 351). The watershed lands appear, on first impression, to come within this statutory description.

It will be recalled, however, that the 1910 act authorized the transfer of the management and control of

the watershed lands to the landowners in the Strawberry Valley project whenever the management and operation of the irrigation works should pass to the landowners under the Reclamation Act. Section 6 of the Reclamation Act of 1902 provides that the management and operation of irrigation works constructed under the act shall pass to the owners of the lands irrigated from such works whenever the payments required by the act have been made for the major portion of the lands irrigated from the works. Subsection G of the Fact Finders' Act also authorizes the transfer of the care, operation, and maintenance of project works to a water users' association whenever two-thirds of the irrigable area of a project are covered by water-right contracts.

The complete management and control of the land described in the 1910 act was turned over to the Strawberry Water Users' Association, pursuant to these statutory authorizations, by the 1928 amendment to the contract of September 28, 1926. The Association thereupon acquired a contractual right, subsequently reaffirmed by the contract of October 9, 1940, to exercise complete powers of management and control over the watershed lands. Such powers clearly include the authority to issue oil and gas leases.[4] This contractual right was in existence on August 7, 1947, the effective date of the Mineral Leasing Act for Acquired Lands, and I do not believe that it was affected by that legislation. There is nothing in the language or legislative history of the 1947 act to indicate that it was intended to abrogate contractual

[4] Since about 1928, the Strawberry Water Users' Association has been issuing leases on the watershed lands for grazing purposes. On August 1, 1949, the Association issued a lease to Tom P. Costas authorizing him to prospect for and mine gold, silver, copper, and other minerals, excluding oil and gas, on a section of the watershed lands. This lease was approved by the Commissioner of Reclamation on December 20, 1949, pursuant to a delegation of authority to him from the Secretary of the Interior (Order No. 2534, 14 F. R. 5693).

rights theretofore acquired respecting Government-owned lands under earlier legislation, such as the provisions of the 1910 act relating to the management and control of the watershed lands.

It is my opinion, therefore, that the watershed lands are not subject to leasing by the Secretary of the Interior under the Mineral Leasing Act for Acquired Lands, but that such lands are subject to mineral leasing by the Strawberry Water Users' Association pursuant to its contract of October 9, 1940.

It follows that there was no authority in the Department to issue the five oil and gas leases discussed in this memorandum, to the extent that the leases include watershed lands. However, on April 26, 1950, the Strawberry Water Users' Association approved and ratified the five leases in so far as they include watershed lands, subject to the condition that the rentals and royalties received from the leases with respect to those lands be credited or paid to the association in conformity with the 1910 act and as provided by subsection I of the Fact Finders' Act. The ratification was accepted by the Carter Oil Company (the holder of the leases) and approved by the Acting Assistant Commissioner of the Bureau of Reclamation for the Secretary of the Interior. Consequently, there is now no problem with respect to the validity of the leases to the extent that they include watershed lands.

II

Your second question is whether the proceeds from the five oil and gas leases, in so far as they are derived from watershed lands, should be distributed as provided for in section 35 of the Mineral Leasing Act (30 U.S.C., 1946 ed., sec. 191) or as provided for in subsection I of the Fact Finders' Act.

It follows from the discussion of your first question that the proceeds from the leases, in so far as they are derived from watershed lands, should be applied in conformity with the 1910 act and subsection I of the Fact Finders' Act, as provided in the ratification of April 26, 1950.

III

Your two questions are directed only to the watershed lands which are included in the five oil and gas leases. However, the greater portion of the land included in two of the leases (Salt Lake 068643 and 068644) consists of the 3,200 acres of non-watershed lands which were withdrawn by the President's proclamations of August 3 and 14, 1905, but which were not affected by the act of April 4, 1910. The question of the validity of the two leases in so far as they include these 3,200 acres has not been considered in this opinion.

(Sgd) Mastin G. White
Solicitor